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A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

NORTH IDAHO BROADCASTING COMPANY — File Nos. BTC-890929EG, BAPH-890929GY

For Transfer of Control of KVNI(AM), Coeur d' Alene, Idaho and for Assignment of Construction Permit of KKCH(FM), Hayden, Idaho

MEMORANDUM OPINION AND ORDER

Adopted: February 18, 1993; Released: March 8, 1993

By the Commission:

1. The Commission has before it petitions for stay and for reconsideration filed by Rook Broadcasting of Idaho, Inc. ("RBI"), licensee of KCDA(FM), Coeur d' Alene, Idaho, of an action of the Chief, Audio Services Division, Mass Media Bureau ("Bureau"), of August 12, 1991. By that action, the above-captioned applications for transfer of control of North Idaho Broadcasting Company ("NIB"), licensee of KVNI(AM), Coeur d' Alene, Idaho, from Hagadone Investment Company ("HIC") to Burl Todd Hagadone ("Todd"), and the assignment of construction permit for KKCH(FM), Hayden, Idaho (formerly KMWC),[1] from Media West, Inc. ("MWI") to NIB were granted and a petition to deny filed by RBI was denied. Opposition and reply pleadings to the petitions for reconsideration and stay have been submitted.[2]

2. *Background.* The subject applications sought Commission consent to assign the construction permit for unbuilt FM station KKCH, Hayden, Idaho from MWI to NIB, and to transfer control of NIB, licensee of KVNI(AM), Coeur d' Alene, Idaho, from HIC, controlled by Duane B. Hagadone, to Todd, Duane's son. HIC also controls *The Coeur d' Alene Press,* the only daily newspaper published in Coeur d' Alene. Thus, through HIC and subsidiaries, Duane Hagadone controlled the newspaper and KVNI(AM), a grandfathered newspaper/broadcast combination. Another son, Bradley Hagadone, is an officer and director of the newspaper and originally was proposed as 49% shareholder in the NIB transfer of control (with 51% to be owned by his younger brother Todd), but his share was removed by amendment, leaving Todd as the sole shareholder of NIB. Upon consummation of these transactions, Duane Hagadone retained control of the newspaper with his son Bradley and transferred the AM station to his other son Todd. Todd also acquired the permit for unbuilt FM station KKCH, which is in the same market, from MWI.

3. RBI alleged that a grant of the applications would result in a violation of the Commission's cross-interest policy because of son Bradley Hagadone's proposed 49% equity interest in NIB coupled with his official positions with HIC and the *Press*.[3] It further maintained that Duane Hagadone was the real-party-in-interest in the applications and that his control over these media interests is prohibited under Section 73.3555 of the Commission's rules.[4] RBI further asserted that NIB, under the leadership of Duane Hagadone, had abused its grandfathered ownership of KVNI and the *Press* through anticompetitive practices directed at RBI's station KCDA(FM), Coeur d' Alene.

4. In its August 12, 1991 letter denying RBI's objections, the Bureau found that RBI had failed to make a *prima facie* showing that grant of the applications would be inconsistent with the public interest, convenience and necessity. The Bureau also concluded that even if a *prima facie* case had been made, no substantial and material questions of fact existed that would warrant designating the applications for hearing. Specifically, the Bureau found that RBI had failed to demonstrate how Duane Hagadone's family and business relationships or purported anticompetitive conduct established that he is the real-party-in interest behind the proposed assignee. The Bureau determined that, in light of relevant precedent, the existence of a familial or business relationship, standing alone, is not sufficient to create a presumption of common control for purposes of adjudging compliance with the Commission's multiple ownership rules and related policies. The Bureau also found that, in light of the parent-child relationship between Duane and Todd Hagadone, the presence or absence of consideration supporting the transaction is not dispositive on the issue of potential *de facto* control by Duane Hagadone. The Bureau also noted that Duane Hagadone had provided his sworn affirmation that he would retain no impermissible interest or connection with the stations post-consummation, and that RBI had provided no evidence to the contrary, beyond mere speculation. Finally, the Bureau found that Duane Hagadone's purported anticompetitive conduct in connection with his operating a grandfathered AM/newspaper combination, even if true, was not inherently disqualifying.

5. RBI now contends that the Bureau failed to correctly evaluate whether RBI made a *prima facie* case with respect to its allegations of real party-in-interest questions and anticompetitive practices in accordance with the two-step analysis of *Astroline Communications Limited Partnership v. Association for Television and Children v. FCC,* 665 F.2d 1264 (D.C. Cir. 1981).

[1] Effective September 23, 1991, the KMWC call letters were changed to KKCH.

[2] Inasmuch as RBI's petition for stay was filed September 9, 1991, subsequent to consummation of the subject transactions on August 19, 1991, it is moot and must be dismissed. We note, however, that although the parties consummated their transaction on the basis of the Bureau's decision, they did so with full cognizance of the risk that the Commission or the courts might thereafter reverse that decision. *See, e.g., Improvement Leasing Co.,* 73 FCC 2d 676, 684 (1979), *aff'd sub nom. Washington*

[3] In its August 12, 1991 decision, the Bureau properly found that any potential cross-interest issue was resolved through an amendment which withdrew the proposal that Bradley have an ownership interest in NIB.

[4] Section 73.3555 provides in pertinent part that no license for an AM or FM station will be granted to any party if such party owns, operates or controls a daily newspaper in the same market.

FCC, 857 F.2d 1556 (D.C. Cir. 1988).[5] RBI states that its petition to the Bureau noted that Duane had already ensconced Brad in the upper management of his company; that the proposed principals of the assignee maintained "business and/or personal connections" to Duane rather than to Todd; that ownership amendments to the application seeking to resolve potential cross-interest problems instead demonstrated Duane's continued "control" of the application; that Duane "dominated" the transaction by signing documents on behalf of the assignee and by providing unsecured loans to NIB; that the amount of consideration was misrepresented by the applicants in that Todd lacked resources of his own and the $300,000 note to be executed by him is unsecured and likely to be paid only from future station profits; and that Duane had ample motive to use a "sham" transaction to avoid the multiple ownership rules, which would otherwise bar the present transaction, in order to acquire "a valuable new station in the area."

6. In support of its allegations of anticompetitive activity, RBI points out that it showed the Bureau that the Hagadone media had restricted KCDA's access to news matters, such as a local political debate; that the Hagadone-owned *Press* was so biased in its news coverage that it would deliberately avoid any favorable mention of KCDA or its employees; that the *Press* engaged in discriminatory and predatory advertising practices; that the *Press* disseminated false audience survey information; and that the listing for KCDA was omitted from Hagadone's locally owned telephone directory. RBI also contends that it gave numerous examples in which Duane sought to dominate the local media market and manipulate the transfer and assignment applications in furtherance of that goal.

7. Procedurally, RBI argues that the Bureau, had it assumed the above facts were true, "would have been compelled to conclude that grant of the Hagadone applications would be *prima facie* inconsistent with the public interest."[6] RBI further asserts that the Bureau erred in concluding that even if RBI had made a *prima facie* case, there were no substantial and material questions of fact presented. RBI argues, in this regard, that the Bureau erred by "improperly impos[ing upon it] a burden to absolutely disprove" responses of the applicants to RBI's allegations. Finally, RBI asserts that reconsideration is warranted in light of new evidence of Hagadone's anticompetitive use of media that has arisen since RBI's last opportunity to present evidence on that issue.

8. *Discussion.* Section 309(d)(1) of the Communications Act requires a two- step analysis for judging the sufficiency of RBI's petition. In reviewing this case to determine whether the petition is sufficient, we must first determine whether the petition and its supporting affidavits contain specific allegations of fact sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest. 47 U.S.C. Sec. 309(d)(1). In making this determination, we assume that the specific facts set forth by the complaining party are true without reference to contrary evidence, and we are limited to consideration of the petition and its supporting affidavits during this initial inquiry. *Astroline,* 857 F.2d at 1561. Allegations within these documents that consist "of ultimate, conclusionary facts or more general allegations on information and belief, supported by general affidavits . . . are not sufficient." *Gencom, Inc. v. FCC,* 832 F.2d 171, n.11 (D.C. Cir. 1987). If we determine that the petition satisfies the threshold standard, the inquiry proceeds to the second phase. The Commission must then determine whether, on the basis of the application, the pleadings filed, or other matters which it may officially notice, a substantial and material question of fact is presented. 47 U.S.C. Sec. 309(d)(2). Should the Commission conclude that such a question of fact has been raised, or if it cannot, for any reason, find that grant of the application would be consistent with the public interest, it must conduct a hearing in accordance with 47 U.S.C. Sec. 309(d)(2).

9. The facts alleged by RBI, even if considered true, did not establish a *prima facie* issue as to whether Duane was the real party-in-interest to the transaction. Many of the facts alleged are similar to those we have found acceptable in other multiple ownership cases involving familial relationships.[7] *Cannon's Point Broadcasting Co.,* 93 FCC 2d 643, 655 (Rev. Bd. 1983), *recon. denied,* 94 FCC 2d 72, *review denied,* FCC 84-161 (April 13, 1984) (subsequent history omitted) (no real party-in-interest issue based merely on financial and business ties among family members); *KTRB Broadcasting Co., Inc.,* 46 FCC 2d 605 (1974) (no real party-in-interest issue where transferee included sons of broadcasters in same market who received financing from their fathers). We have noted that where family members are involved, a petitioner seeking a real party-in-interest issue has a heavy burden, because even independent family relationships may have financial or business ties which would be persuasive indicia of common ownership or real party status in non-family situations. *Cannon's Point,* 93 FCC 2d at 654-55. *See also Clarification of Commission Policies Regarding Spousal Attribution,* 7 FCC Rcd 1920, 1922-23 (1992) (discussing indicia of common control in familial relationships). For example, RBI has not shown that the transfer application was part of a pattern of applications by the Hagadone family involving entities with similar articles of incorporation, bylaws, financial structure, proposed policies, programming, and consulting experts. *Compare Alan K. Levin (HDO),* 45 Fed. Reg. 85,512, 85,519 (Dec. 29, 1980) (history of family interests and parallels between family members' supposedly independent stations and applications' proposals suggested that applications were a part of a family business operation). Nor has RBI shown a continuing relationship be-

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[5] The *Astroline* analysis, as discussed in more detail in para. 7, *infra,* requires that we determine (1) whether the petition's facts, assuming they are true, show that a grant of the application would be *prima facie* inconsistent with the public interest and, if so, (2) whether a substantial and material question of fact is presented, which would require a hearing.

[6] RBI contends that the Bureau further erred in limiting its *prima facie* analysis to the petitioner's allegations alone, based on the petition and supporting affidavits, and in ignoring RBI's February 11, 1991 reply to the applicant's joint response to a Bureau December 24, 1990 letter of inquiry. The *prima facie* analysis does not, however, properly include the petitioner's subsequent pleadings.

[7] RBI's reliance on the substantive facts of *Astroline* is misplaced. In *Astroline,* the Court considered the totality of circumstances surrounding the Chase family's interrelationships in determining that a question of fact had been raised as to whether the proposed transferee had exercised *de facto* control over the licensee during the one-year period prior to the filing of the transfer of control application. In the instant case, RBI's allegations involved potential future control and were purely speculative.

tween the Hagadone family businesses, such as shared property, independent contractors, or leases. *Arnold L. Chase*, 5 FCC Rcd 1642, 1644 (1990). Thus, RBI has failed to sustain its burden of establishing a *prima facie* case that KVNI and KKCH will not be independently operated. *See High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 435 (Rev. Bd. 1983).[8]

10. RBI's claim to a *prima facie* showing is based on the conclusions it draws from the facts asserted, *i.e.*, that the transaction was a sham and was presented to the Commission in bad faith. However, it is the facts, standing alone, along with any supported or reasonable inferences, that must be of such significance as to support a *prima facie* case, not the facts and the unsupported and unreasonable inferences proffered by a petitioner. *See Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985). Nor does a petitioner's showing constitute a *prima facie* showing merely because the Commission finds it appropriate, as was the case here, to seek and consider clarifying and additional information from the applicants pertaining to the family and business relationships underlying the transactions.

11. We also disagree with RBI's assertions that the existence of son Bradley's originally proposed 49% share in NIB, and Duane's business and personal connections with the other proposed principals of the assignee, Eugene Miller, Bernidine Dami, George Cole, and Joseph Stanosch, suggested that Duane not only dominated the transaction but intended to control the future operations of the stations. Though he remains an officer and director of the *Press*, Bradley's interest in NIB was terminated. Similarly, amendments filed to remove Miller, Duane's personal attorney, and Dami, Duane's long-time employee, as principals, tend to indicate an intent *not* to control. RBI provides no support for its allegation that Cole, the president and principal owner of MWI (assignor of the construction permit for unbuilt FM station KKCH), ever worked for Duane, or received a $40,000 payment from Duane to obtain the construction permit for KKCH. RBI's allegation that Stanosch, KVNI's general manager now and under Todd's stewardship, will operate the station as Duane'e alter ego is pure speculation. Thus, RBI failed to present any evidence to support its conclusions on these matters.

12. Even assuming, *arguendo*, that RBI had presented a *prima facie* case that Duane was the real party-in-interest to the applications, an examination of all the information on record establishes no substantial and material question of fact as to whether grant of the applications would serve the public interest. The evidence flatly contradicts RBI's unsupported allegations that Cole and Stanosch would remain under Duane's post-consummation control. In a sworn declaration, Cole categorically denied that he worked for or received a $40,000 payment from Duane to obtain the construction permit for KKCH. Stanosch further affirmed that he will not operate as Duane's *alter ego*, and that he "has [had] no regular contact with Duane Hagadone or any other executives of HIC." Duane Hagadone also affirmed that he has had only minimal contact with Stanosch since his hiring as KNVI's general manager in 1985, as Stanosch "has an extensive background on broadcasting and needs no supervision."

13. Duane also affirmed that he will neither exercise control nor provide further assistance to Todd subsequent to consummation. The evidence flatly contradicts RBI's allegations that Duane's role in the prosecution of the application belies his stated intent. Duane's explanation that he originally signed the applications on behalf of both assignor and assignee to maintain literal compliance with 47 C.F.R. Section 73.3513(a)(3) is credible.[9] At the time the applications were signed, none of the proposed officers of the proposed assignee were officers of NIB.

14. The evidence also flatly contradicts RBI's assertion that NIB misrepresented the amount of the consideration for the sale of the station, in that Todd lacked sufficient resources of his own to satisfy the $300,000 purchase price. In an affidavit, Todd, a newspaper publisher's assistant then residing in Los Angeles, represented that he would return to Coeur d' Alene by the end of 1991. Todd also represented that he would execute an unsecured $300,000 promissory note as consideration, representing amounts that HIC has contributed to NIB, as well as projected accounts receivable at the time of the transfer. Todd affirmed that since projected costs will be covered by cash on hand, and because KVNI is self-sustaining, he anticipates no need for additional outside financing. In this regard, we note that seller financing is a common practice in the industry, and a father's desire to assist his son in establishing his own business through the provision of seller financing does not raise a question of *de facto* control in the father. *See, e.g., High Sierra Broadcasting, Inc., supra.*

15. Finally, RBI alleged that an evidentiary hearing is required where in addition to a family relationship and close business ties, there has been a pattern of oligopolistic and anticompetitive behavior, and there is a motive for deception. The Bureau correctly compared *Levin* to the facts in this case in finding designation for hearing unwarranted where all allegations apart from family consanguinity were speculative. Although RBI asserts, in light of the submitted affidavit of its principal, John H. Rook, that the instant applications represent an attempt to circumvent the multiple ownership rules by "put[ting the FM station] in [Todd's] name," nothing in that affidavit provides any evidence beyond bare allegations that Duane Hagadone actually intends or intended to retain control subsequent to consummation, or that the stated motivation for divesting the AM station, *i.e.*, estate planning, involved deception.

16. RBI supplemented its petition on April 29, 1992, pursuant to 47 C.F.R. Section 1.106(f). The supplemental pleadings include portions of a 1992 Coeur d' Alene business directory, which lists Duane Hagadone as the current president of KVNI Radio, although the consummation of the transfer to Todd was reported to the Commission on August 21, 1991. RBI argues that the subject listing "expose[s] a deliberate fraud by Duane and the Hagadone companies" upon the Commission's processes and constitutes a basis for reconsideration of the prior grant. In its opposition, NIB asserts that the subject business listing is

[8] It must also be noted that, contrary to RBI's argument on reconsideration, a number of its allegations are not properly considered under the *prima facie* analysis because they were first raised in pleadings subsequent to the original petition to deny. Even considered under the *prima facie* analysis, however, they are insufficient, for the reasons set forth herein.

[9] Section 73.3513(a)(3) provides that "[a]pplications, amendments thereto, and related statements of fact required by the FCC must be signed by . . . an officer, if the applicant is a corporation."

erroneous, and suggests that it is explained by the inadvertence or failure of the publishing company to update its prior listing, which likelihood NIB further submits is consistent with its own inquiry of the publisher's staff. We conclude that the existence of the apparently erroneous business listing does not provide sufficient evidence to warrant further inquiry into "fraud" on the part of Duane Hagadone. Moreover, we believe a strong inference can be drawn that the stations have been operating under Todd's control since the consummation of the transactions on August 21, 1991, in light of the fact that the only evidence RBI has been able to submit to the contrary is the apparently erroneous listing in the Polk directory.

17. The Bureau also properly concluded that the facts underlying RBI's allegations concerning NIB's anticompetitive business practices, even if true, were not inherently disqualifying. In this connection, the Commission has terminated oversight and enforcement of the policies which would encompass the allegedly abusive business practices RBI charges that NIB allegedly engaged in. *Unnecessary Broadcast Regulation,* 57 RR 2d 913 (1985), *aff'd sub nom. Telecommunication Research and Action Center v. FCC,* 800 F.2d 1181 (D.C. Cir. 1986) and *Unnecessary Broadcast Regulation (Business Practices),* 59 RR 2d 1500 (1986), *recon. denied,* 2 FCC Rcd 3474(1987)(terminating Commission oversight of, *inter alia,* licensee distortion of audience ratings, joint sales practices, and the use of stations for personal advantage in other business activities). Moreover, non-adjudicated allegations of non-FCC related anticompetitive misconduct generally do not raise character qualifications issues, and RBI has presented no basis justifying departure from this policy. *See Character Qualifications in Broadcast Licensing,* 102 FCC 2d 1179, 1205 and n.60 (1986), *on recon.,* 1 FCC Rcd 421 (1986), *appeal dismissed sub nom. National Association of Better Broadcasting v. FCC,* No. 86-1179 (D.C. Cir. 1987); *modified in part,* 5 FCC Rcd 3252 (1990); *see also Character Qualifications in Broadcasting Licensing,* 5 FCC Rcd 3252 (1990), *recon. denied,* 6 FCC Rcd 3448 (1991), *further recon. pending; cf. McClatchy Newspapers,* 46 RR 2d 43 (1979); (prior practice of providing newspaper stories to co-owned stations at the same time they were supplied to AP may have given the stations a "jump" on the competition; but that was not deemed "significant" or an abuse); *Newhouse Broadcasting Corp.,* 46 RR 2d 35 (1979) (news story overlap, common use of newspaper morgue, use of print reporters at broadcast station during a strike, and the existence of cooperative advertising trade-out arrangements did not constitute an abuse of cross-ownership). Furthermore, NIB has submitted substantial factual showings and affidavits rebutting the petitioner's speculative allegations respecting these issues.

18. *Conclusion.* In view of the foregoing, IT IS ORDERED, that, pursuant to 47 C.F.R. Sec. 1.102(b)(2), the petition for stay filed by Rook Broadcasting, Inc., Debtor-in-Possession, IS DISMISSED as moot, and that, pursuant to 47 C.F.R. Sec. 1.106, the petition for reconsideration filed by Rook Broadcasting, Inc., Debtor-in-Possession, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Houston Cellular Telephone Company — File No. 06297-CL-MP-92

For Authority to Modify Existing Facilities on Station KNKA367, in the Domestic Public Cellular Radio Telecommunications Service in Market 10, Houston, Texas

MEMORANDUM OPINION AND ORDER

Adopted: March 1, 1993; Released: March 8, 1993

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. Texas 16 Cellular Telephone Company (Texas 16) has filed a petition to deny (Petition) the captioned application filed by Houston Cellular Telephone Company (Houston). Houston seeks authority to modify its non-wireline cellular system for the Houston, Texas (Houston) Metropolitan Statistical Area (MSA) by adding a new cell at Damon, Texas (Damon). For the reasons discussed below, we grant the Houston application, and deny Texas 16's Petition.[1]

II. DISCUSSION

2. Although 39 dBu contours should generally be kept within an applicant's authorized cellular service area, contour extensions are permitted if they are *de minimis* and the applicant provides a specific engineering explanation as to why the extension is necessary. *See Procedures Update*, 52 Rad. Reg. 2d (P&F) 725, 726 (1982), *aff'd, Cellular Radio Service*, 56 Rad. Reg. 2d (P&F) 1583, 1587-88 (1984); Sections 22.903(a) and 22.923(c)(1) of the Commission's Rules. We consider such factors as the population and terrain of the area involved, the shape of adjoining boundaries, and any special engineering problems. *See, e.g., Saco River Cellular Telephone Company*, 2 FCC Rcd 2009 (Mobile Serv. Div. 1987); *South Carolina Metronet, Inc.*, 6 FCC Rcd 968 (Mobile Serv. Div. 1991). The Commission initially established the *de minimis* extension policy in order to enable cellular carriers to have slight overlap with a neighboring market where provision of cellular coverage in the border areas of the home market would otherwise be technically infeasible by reason of the exigencies of radio propagation. *See Cellular Radio Service*, 56 Rad. Reg. 2d (P&F) 1583, 1588 (1984).

3. Houston proposes a relatively small extension, amounting to only 1.5 percent of the total cell area,[2] for a total of 3.9 square miles. Texas 16 contests these figures in its Petition, arguing that they are based on the erroneous base figure of 50 maximum Effective Radiated Power (ERP) for the proposed antenna, when in fact, the figure should be 56 maximum ERP. *See Declaration of Richard L. Vega*, Petition at Exhibit A (*Vega Declaration*). In its opposition, Houston maintains that the 50 maximum ERP figure is correct, and the *Vega Declaration* is flawed.[3] Houston explains that the *Vega Declaration* failed to take into account certain transmission-line parameters specified in the application that result in a larger total power loss than Texas 16 estimates, and correlatively, a lower maximum ERP. *See Declaration of Deron Isaac*, Houston Opposition at Attachment A, para. 4 (*Isaac Declaration*). Because Texas 16 did not challenge the *Isaac Declaration* and the analysis itself is compelling, we must reject Texas 16's allegations that the maximum ERP for the Houston application was misrepresented. It therefore follows that the Houston application shows the correct contour dimensions, based on 50 maximum ERP.

4. The Texas 16 Petition also challenges Houston's decision to place the cell at Damon, arguing that it results in uninvited coverage of a five-mile strip of Highway 442 in the Burleson, Texas (Burleson) Rural Service Area (RSA), Texas 16's home market, while simultaneously failing to be ideally situated to cover the community of Needville, or Highway 36. In opposition, Houston explains that the extension is necessary in order to cover not only Needville and Highway 36, but also Four Corners, Horsheshoe Lake, and Highway 442. Houston further contends that Texas 16 disingenuously restricted its comments in its Petition to only Needville and Highway 36, whereas Houston showed its intention to cover all of the stated areas in the Houston MSA in its application. See Houston Application at Exhibit 1. Placement at Damon was unavoidable, explains Houston, because:

> [r]elocation of the cell further [sic] away from the border . . . would necessarily result in a significant impairment or total elimination of 39 dBu coverage to the MSA border areas at issue.

Houston Opposition at 5. Also, the MSA border area where Houston proposes its extension is sharply irregular, as it closely tracks the winding San Bernard River, which jack-knifes into the western portion of the proposed cell. *See, e.g., Houston Cellular*, 5 FCC Rcd 7140 (granting 19.8 percent extension where the "MSA boundary separating Houston is of an irregular shape"). We therefore find that Houston has satisfactorily demonstrated that the placement of the cell at Damon is both unavoidable and justified in order to provide coverage to the areas in question at the

[1] We apply the 39 dBu contour standard because the captioned application was filed on May 28, 1992, which was prior to the change to the 32 dBu contour standard that became effective on July 16, 1992. *See Unserved Areas Second Report and Order, infra.*

[2] *See, e.g., Houston Cellular Telephone Company*, 5 FCC Rcd 7140 (Mobile Serv. Div. 1990) (19.8 percent cell extension is *de minimis); Rhys G. Mussman*, 3 FCC Rcd 6808, 6811 (Com. Car. Bur. 1988) (19 percent cell extension is *de minimis); South Carolina Metronet*, 6 FCC Rcd at 968 (Mobile Serv. Div. 1991) (16.7 percent cell extension is *de minimis).*

[3] It is significant to note that Texas 16 did not deem it necessary to file a reply to Houston's opposition.

border of the Houston MSA. We also reject Texas 16's contention that the captioned extension would cover a five-mile strip of Highway 442 in the Burleson market. The maps Houston submitted with its application and in this proceeding demonstrate that no part of Highway 442 exists in the area where the contour extension into the Burleson RSA is proposed.

5. Lastly, Texas 16 contends that the proposed extension would be unduly large under the 32 dBu contour standard, and would be grandfathered under the new standard "irrespective of whether it meets the Commission's *de minimis* criteria." Petition at 3-4. We reject this argument.[4] The change from a 39 dBu standard to a 32 dBu standard became effective on July 16, 1992. However, the captioned application was filed on May 28, 1992. Because the application was filed prior to the change in contour standards, it is axiomatic that the standard in effect at the time the application was filed must be applied. *Western Maine Cellular, Inc. et al.*, 7 FCC Rcd 8648 (Mobile Serv. Div. 1992) (holding that 32 dBu standard does not apply to applications filed prior to July 16, 1992). Furthermore, grandfathering of 39 dBu *de minimis* contour extensions filed prior to July 16, 1992, contrary to Texas 16's contentions, would proceed pursuant to established case law regarding *de minimis* extensions. *See Unserved Areas, Second Report and Order*, 7 FCC Rcd 2449, 2456 at n.35 (1992). Based on the foregoing considerations, we find the proposed extension is *de minimis* and adequately justified.

III. CONCLUSION

6. Accordingly, the petition to deny filed by Texas 16 Cellular Telephone Company IS DENIED. The application of Houston Cellular Telephone Company IS GRANTED. This authorization does not include the right to any interference protection in any areas outside the Houston, Texas MSA and is conditioned upon coordinating with the current and future co-channel licensees in the areas outside the Houston, Texas MSA. The licensee herein is put on notice that in the event current or future MSA or RSA licensees encounter interference from any extensions, the licensee herein will have to change frequencies in those cells or pull back its contours to eliminate any interference due to an extension.

IV. ORDERING PARAGRAPHS

7. Accordingly, IT IS ORDERED THAT the Petition to Deny filed by Texas 16 Cellular Telephone Company IS DENIED.

8. IT IS FURTHER ORDERED THAT the captioned application filed by Houston Cellular Telephone Company, File No. 06297-CL-MP-92, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

[4] Nor can we adopt Texas 16's argument that Houston should have used a directionalized antenna. Houston has satisfactorily shown that it must use an omnidirectional antenna in order to provide coverage to the roads and towns close to the Houston MSA border.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-37

In re Applications of

LEHIGH VALLEY COMMUNITY BROADCASTERS BOARD OF DIRECTORS
(Hereafter "Lehigh")
Allentown, Pennsylvania
Req: 89.3 MHz; Channel 207A
0.12 kW (H&V); 245 meters (H&V)
File No. BPED-891019MF

BEACON BROADCASTING CORPORATION
(Hereafter "Beacon")
Allentown, Pennsylvania
Req: 89.3 MHz; Channel 207A
0.150 kW (H&V); 244.8 meters (H&V)
File No. BPED-900905ML

NORTHAMPTON COMMUNITY COLLEGE
(Hereafter "Northampton")
Bethlehem Township, Pennsylvania
Req: 89.5 MHz; Channel 208A
0.004 kW (H) 0.100 kW (V)
20 meters (H&V)
File No. BPED-900202MC
[Previously Dismissed]

For Construction Permit for a
New Noncommercial, Educational
FM Station

HEARING DESIGNATION ORDER

Adopted: February 5, 1993; Released: March 9, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new, noncommercial, educational FM station.

2. *Preliminary Matters.* On November 13, 1990, the Chief, FM Branch returned Northampton's application because the protected contour (60dBu) of the Northampton proposal would overlap the interfering contour (54dBu) of first adjacent channel station WDVR(FM), Delaware Township, New Jersey in violation of 47 C.F.R. § 73.509. On December 12, 1990, Northampton filed a petition for reconsideration of this return. Specifically, Northampton's petition (1) admitted that it had made a typographical error in the preparation of its application, and did not contest the staff study of its application; (2) stated that it was not possible to file a curative amendment to eliminate or substantially mitigate the interference received; and (3) requested a waiver of 47 C.F.R. § 73.509. In support of its waiver request, Northampton stated that: (1) the frequency requested is the only usable frequency with which to construct a facility on the College's campus; (2) its proposal does not cause interference to other stations; rather, Northampton would only receive interference. This received interference is acceptable to the college and not detrimental to the goals of the broadcast program; (3) the proposed station will be an integral part of the College's communications curriculum which will be used for community outreach; and (4) the Commission has a special obligation under the terms of the Communications Act to ensure a fair and equitable distribution of available broadcast channels, and denial of the waiver request will preclude a local, educational broadcast service to the Bethlehem, Pennsylvania area.

3. We disagree with Northampton's assertions. An engineering study of Northampton's proposal reveals that the received prohibited contour overlap would encompass 58 percent of Northampton's proposed 60 dBu protected contour. As originally filed, Northampton's application thus failed to comply with the Commission's technical requirements as articulated in 47 C.F.R. § 73.509. Furthermore, Northampton did not request a waiver of this rule section at the time its application was filed. As such, the application was properly returned as unacceptable for filing pursuant to 47 C.F.R. § 73.3566(a). (Applications which are determined to be patently not in accordance with the FCC rules, regulations, or other requirments, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing...) As the Commission has previously stated, all stations have a potential preclusionary effect as to the institution of other nearby facilities for new or increased FM broadcast service to the public. Proposed facilities which involve overlap received contribute toward less efficient channel usage because the overlap received decreases the normally protected 60 dBu service area, while continuing to cause the same preclusionary consequences as a fully efficient facility (i.e. one without the overlap received). Accordingly, to waive the prohibition against overlap received based on the reasons proffered by Northampton would effectively nullify the prohibition against overlap as a means of assuring efficient utilization of the FM broadcast spectrum.

4. In a recent decision involving waiver requests of contour overlap caused and received, the Commission distinguished first adjacent channel overlap from second or third adjacent channel contour overlap:

> Overlap of co-channel or first adjacent channel signals is a more serious matter since the interference that may occur results in the loss of service over a wide area. Second or third adjacent channel overlap may result in the replacement of one signal by another (not the complete loss of service) and is confined to a very small area around the transmitter of the interfering station. In addition, the potential for such interference to occur depends to a great extent on the quality of the receivers used within the affected area.

See Educational Information Corporation, 6 FCC Rcd 2207, 2208 (1991), at Paragraph 9. Compelling circumstances must be advanced before waivers of 47 C.F.R. § 73.509 for first-adjacent stations can be considered. This has not been

done in the instant case. Consequently, Northampton's request for a waiver of 47 C.F.R. § 73.509, and its petition for reconsideration, will be denied.[1]

5. *Lehigh.* On May 11, 1990, Lehigh amended its application to indicate that it was financially dependent upon a Federal grant administered by the National Telecommunications and Information Administration. Commission records indicate that Lehigh has not received this grant. Accordingly, an appropriate financial issue will be specified.

6. Lehigh has amended Item 8, Section II of its application on May 11, 1990, February 25, 1991, and November 18, 1991 to reflect changes in its Board of Directors. However, the applicant failed to include amended responses to Section II, Items 6, 7, and 9 of FCC 340 in these three amendments. Accordingly, Lehigh will be required to file an amendment with respect to these Items with the presiding Administrative Law Judge within 30 days of the release of this Order.

7. Lehigh proposes to mount its antenna on the existing tower of WFMZ-TV, Allentown, Pennsylvania. However, engineering analysis of Lehigh's application reveals a discrepancy between the information contained in the Commission's data base for this tower and that provided by the applicant. Specifically, Lehigh lists the overall height above ground level and overall height above mean sea level of its antenna's supporting structure (the WFMZ-TV tower) as *140* meters and *424* meters, respectively. However, the Commission's database for these parameters reflects *150.9* meters and *434.3* meters, respectively. Accordingly, Lehigh will be required to file an amendment with the presiding Administrative Law Judge which corrects this discrepancy within 30 days of the release of this Order.

8. *Beacon.* In a letter dated May 10, 1991, the Chief, FM Branch returned Beacon's application as unacceptable for filing due to prohibited contour overlap to station WRDV(FM), Warminster, Pennsylvania in violation of 47 C.F.R. § 73.509. In the letter, the Chief, FM Branch noted:

> [P]ursuant to the Commission's *Public Notice* entitled "Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications" [56 RR 2d 776 (1984)]... the Commission indicated that it would provide *one* opportunity to reinstate applications *nunc pro tunc* where the original application was returned and where a relatively minor curative amendment was filed within 30 days of the date of the return of the application. (emphasis in original)

Beacon's application was retendered on June 10, 1991 accompanied by an amendment which, Beacon claimed, corrected the engineering defect that resulted in the return of the original application. On October 1, 1991, Beacon's application, BPED-900905ML, was reinstated *nunc pro tunc* by Commission letter. On November 19, 1991, Lehigh filed a petition to deny against the Beacon application. Lehigh's petition alleges (1) that Beacon's retendered application would cause prohibited interference to WPVI(TV), television Channel 6, Philadelphia, Pennsylvania, in violation of 47 C.F.R. § 73.525; (2) that Beacon's plotted transmitter site does not agree with the coordinates specified in Section VB, Item 2(b) of its application; and (3) that Beacon's Exhibit VB-2(b) (page 4), sets forth values which exceed the 0.135 kW directional antenna value proposed elsewhere in Beacon's application. Lehigh contends that Beacon has already been afforded an opportunity to correct its defective proposal and receive *nunc pro tunc* acceptance of its application. Consequently, Lehigh argues, resubmission at this time, to correct these additional defects, is expressly barred by the following policy respecting the processing of FM construction permits enunciated in the *Public Notice, supra:*

> In the future, we will, however, expect such applicants to completely review *all* portions of a returned or dismissed application. Thereafter, if the same application is returned or dismissed a second time, it will *not* be afforded *nunc pro tunc* reconsideration rights. (emphasis original)

Therefore, Lehigh contends, Beacon's application, as amended on June 10, 1991, remains patently defective.

9. On December 20, 1991, Beacon filed an opposition to Lehigh's petition. Beacon included in its opposition an engineering statement specifying the method utilized to determine the potential interference area with WPVI(TV). Beacon concluded that the method of determining interference to WPVI(TV) is consistent with Section 73.525(e)(1) of the Commission's rules. With regard to the alleged misplotted transmitter site on the site map, Beacon acknowledges that the transmitter site was incorrectly plotted by a few feet. However, Beacon stated that the proposed antenna is to be mounted on an existing tower at an established antenna farm and due to the numerous towers in the area, confusion over the specific location of the proposed tower was inadvertently plotted in error. Beacon claimed that all other tower information provided within the application was correct. Accordingly, Beacon simultaneosly filed an amendment to correct this minor discrepancy. As support for acceptance of the amendment, Beacon stated that the Commission has held in the past that the incorrect plotting of the proposed antenna site is not an issue when the proposed antenna will be located on an existing tower whose site location is a matter of record with the Commission. With regard to Lehigh's allegation that Beacon's Exhibit VB-2(b) contained incorrect information regarding the proposed directional antenna system, Beacon stated that this defect was a typographical error, but the correct information is clearly contained elsewhere in the application, specifically in Exhibit IV and Exhibit VB-2.

10. On January 15, 1992, Lehigh filed both a reply to the opposition and an opposition to Beacon's December 20, 1991 amendment. Lehigh stated that Beacon's application appeared on a cutoff list (Report No. B-138, released October 15, 1991) establishing November 19, 1991 as the deadline for submission of amendments as of right. Beacon claimed that Lehigh has neither requested leave to file the

[1] On November 18, 1991, Northampton wrote to the Commission requesting that Lehigh be ordered to share its proposed frequency with Northampton, or in the alternative, that Northampton be afforded the opportunity to prepare and file an application for the frequency specified by Lehigh and Beacon. In light of the action taken herein, this request will be dismissed as moot.

late-filed amendment nor proffered any justification for its acceptance by the Commission, and therefore, Beacon's amendment must be rejected. Lehigh reiterates its argument that Beacon's amendment must be rejected, in any event, because Beacon has already had one opportunity to correct its defective application, and any further attempt to shore up that proposal through an additional amendment is expressly barred by the Commission's policy statement respecting the processing of defective AM and FM construction permit applications.

11. Beacon proposes to co-locate its antenna on the television tower of WFMZ(TV), Allentown, Pennsylvania. It has been longstanding Commission policy that if an applicant has specified inconsistent data, but clearly proposes to locate its antenna on an existing tower to which specific reference is made in its application, the staff takes official notice of data specified in Commission records for the licensed facilities, and thus often can confidently and reliably resolve the inaccuracy or inconsistency in the data given for the proposed tower location or height. *See R. Donnie Goodale,* 7 FCC Rcd 1495 (1992); *David T. Murray,* 5 FCC Rcd 5770 (1990); and *Steven B. Courts,* 4 FCC Rcd 4764 (1989). Accordingly, for administrative convenience and good cause, we shall accept Beacon's December 20, 1991 amendment which corrects the discrepant coordinates.

12. We now turn to the allegations raised by Lehigh with respect to Beacon's compliance with the Commission's rules pertaining to interference to television channel six as set forth in 47 C.F.R. § 73.525. Lehigh contends that Beacon's application should be dismissed because of predicted interference to Channel 6 television station WPVI, Philadelphia, Pennsylvania. However, contrary to Lehigh's contention, noncompliance with Section 73.525 does not affect the acceptability of Beacon's application. Nevertheless, the Commission could not grant Beacon's application until this defect is corrected.

13. On May 28, 1992, Capital Cities/ABC, the licensee of WVPI-TV, Philadelphia, Pennsylvania filed an informal objection to Beacon's application. The objection asserted that Beacon's proposal would result in interference to the signal of its station. As a result of this objection, Beacon filed an amendment on July 27, 1992 which brings its application into compliance with Section 73.525 by a reduction in the number of people who will receive interference and by the installation of filters within the area predicted to receive interference. Lastly, Beacon's July 27, 1992 amendment corrected the directional antenna value discrepancy by reducing the proposed effective radiated power to 0.125 kilowatts vertically polarized and utilizing a more restrictive directional antenna pattern. Accordingly, in light of the above discussion, both Lehigh's petition and Capital Cities/ABC's informal objection will be denied.

14. Engineering analysis of Beacon's application reveals that the proposed maximum ERP of *0.15* kilowatts (V) as listed in Section V-B, Question 9(a), of Beacon's amendment, is not supported in the rest of Beacon's July 27, 1992 amendment. In Beacon's engineering statement, Beacon requests an ERP of *0.125* kilowatts (V) and the *0.125* kilowatts (V) ERP is listed as the maximum ERP everywhere else in the amendment. This discrepancy appears to be a typographical error. The Commission allows such typographical errors to be corrected by an amendment, if the correct information is contained elsewhere in the application. Furthermore, in Exhibit VB-7, titled "Directional Antenna Information" there is an error which appears to be typographical. In this exhibit, the adjusted effective radiated power at an azimuth of 225^0 is listed as *-23.98* dBk. However, using the relative field factor of 0.566 at the 225^0 azimuth, the adjusted effective radiated power is calculated to be *-13.98* dBk. The Commission allows such typographical errors to be corrected by an amendment, if the correct information can be confidently obtained using other information contained elsewhere in the application.

15. In addition, an engineering review of Beacon's application also reveals a discrepancy in its listed overall height above ground level and overall height above mean sea level of its proposed antenna supporting structure. Beacon states that it is mounting on WFMZ(TV)'s existing tower at the coordinates 40^0 33' 54" N.L., 75^0 26' 26" W.L. In its application, Beacon lists the overall height above ground level and overall height above mean sea level of the antenna's supporting structure as *204* meters and *487* meters, respectively. However, the overall height above ground level and overall height above mean sea level of the antenna supporting structure are listed by the FAA as *150.9* meters and *434.3* meters, respectively. Furthermore, the Commission's database shows that there is another tower in the vicinity of Beacon's proposed coordinates; it is listed at 40^0 33' 55" N.L., 75^0 26' 26" W.L. with an overall height above ground level and an overall height above mean sea level of the antenna's supporting structure as *203.6* meters and *487.1* meters, respectively. Since these defects in Beacon's application pertain to its grantability, and not acceptability, Beacon's application is not in violation of the Commission's policy on the processing of patently defective AM and FM applications as set forth in the *Public Notice, supra.* Accordingly, Beacon shall be required to file an amendment with the presiding Administrative Law Judge within 30 days of the date of this Order to correct the above-listed discrepancies.

16. Lastly, an engineering study of Beacon's amended application reveals that its amended Channel 6 interference study was done in accordance with 47 C.F.R. § 73.525. The number of people calculated to be inside the Channel 6 interference area is 3,102. Therefore, the installation of 102 filters on television receivers would be necessary for Beacon's proposal to be in compliance with 47 C.F.R. § 73.525. Accordingly, if Beacon is awarded a construction permit as a result of this proceeding, its compliance with the following condition will be required:

> In accordance with Section 73.525 of the Commission's Rules, Beacon shall effectively install 102 filters on television receivers located within the predicted interference area within ninety (90) days after commencing program tests and, no later than forty five (45) days thereafter, provide TV channel six Station WPVI(TV) with a certification containing sufficient information to permit verification of such installations. [The number of filters to be installed within the area predicted to receive new interference shall be 102.]

17. *Other Matters.* Both Lehigh and Beacon propose to locate their transmitting antennas on the existing tower of WFMZ, Allentown, Pennsylvania. Our engineering study indicates that the applicants failed to address the matter of how they propose to resolve any RF exposure to workers on their respective towers. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that each may have failed to comply with the environmental criteria set forth in the

Report and Order in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). *See also, Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. Section 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since the applicants failed to indicate how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, each will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally,* OST Bulletin No. 65 (October, 1985) entitled "Evaluating Compliance With FCC-Specified Guidelines For Human Exposure to Radiofrequency Radiation," at 28. In situations such as those of Lehigh and Beacon, where there are multiple contributers to radiofrequency radiation, it is necessary to submit a certification that an agreement will be in effect requiring all stations to reduce power or cease operations, as necessary, to assure worker safety with respect to radiofrequency radiation when construction or maintenance is to be performed at the site. *See Public Notice,* August 19, 1992, Mimeo 24479. Therefore Lehigh and Beacon will be required to file, within 30 days of the release of this Order an EA, containing the requisite certification of agreement, with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.,* 71 FCC 2d 229 (1979), *recon . denied sub nom. Old Pueblo Broadcasting Corp.,* 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the applicants' proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted and the presiding judge shall thereafter not consider the environmental effects of the proposal. *See* 47 C.F.R. § 1.1308(d).

18. Lehigh and Beacon both propose to co-locate their antennas above the directional antennas of translator stations W285DB, Allentown, Pennsylvania and W204AC, Emmaus, Pennsylvania. Since their transmission lines would pass by these translators' directional antennas, there is a possibility that their transmission lines could disrupt the translators' directional antenna patterns. Accordingly, Lehigh and Beacon must submit exhibits demonstrating that their proposed facilities would have no adverse effect on the translators' directional antenna patterns.

19. Beacon petitioned for leave to amend its application after the last day for filing amendments as of right. The subject amendments were accompanied by the good cause showing required by 47 C.F.R. § 73.3522(a)(2); consequently, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

20. Lehigh petitioned for leave to amend its application on March 28, 1991 and November 18, 1991 and October 23, 1992. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

21. *Share-time Arrangement.* An issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfallon Denver Educational Broadcasting, Inc.,* 43 Fed. reg. 49560 (October 24, 1978). It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement between themselves.

22. Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University,* 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

23. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

24. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Lehigh, whether the applicant is financially qualified.

2. If a final environmental impact statement is issued with respect to Lehigh or Beacon in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

3. To determine: (a) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest, and, if so, the terms and conditions thereof; (b) the extent to which each of the proposed operations will be integrated into the overall educational operation and objectives of the respective applicants; and (c) whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if either.

25. IT IS FURTHER ORDERED, That Northampton's request for waiver of 47 C.F.R. § 73.509 and its petition for reconsideration ARE DENIED.

26. IT IS FURTHER ORDERED, That Lehigh shall, within 30 days of the release of this Order, file with the presiding Administrative Law Judge the amendments set forth in paragraphs 7 and 8, hereinabove.

27. IT IS FURTHER ORDERED, That in light of the discussion in paragraphs 10 through 15, above, Lehigh's petition to deny the application of Beacon and the Capital Cities/ABC informal objection ARE DENIED.

28. IT IS FURTHER ORDERED, That Beacon shall file the amendments set forth in paragraphs 16 and 17, hereinabove, with the presiding Administrative Law Judge within 30 days of the release of this Order.

29. IT IS FURTHER ORDERED, That if a construction permit is awarded to Beacon as a result of this proceeding, it will be conditioned upon the terms set forth in paragraph 18, hereinabove.

30. IT IS FURTHER ORDERED, That in accordance with paragraph 19, hereinabove, Lehigh and Beacon shall submit the environmental assessments required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

31. IT IS FURTHER ORDERED, That Lehigh and Beacon shall, within 30 days of the release of this Order, file with the presiding Administrative Law Judge the amendment set forth in paragraph 20, above.

32. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Lehigh and Beacon ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

33. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

34. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

35. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-43

In re Applications of

OJEDA BROADCASTING, INC. (hereafter "Ojeda") File No. BPH-910705ML

ROSEMARY HOUSTON (Previously Returned) (hereafter "Houston") File No. BPH-910705MH

For Construction Permit for a New FM Station on Channel 243A in Hobbs, New Mexico

HEARING DESIGNATION ORDER

Adopted: February 23, 1993; Released: March 9, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned applications for a new FM station.

2. On August 7, 1991, the Commission returned Houston's application as not sufficient for tender. On September 10, 1991, Houston filed a petition for reconsideration of the return of her application. Additionally: (i) On August 13, 1991, Houston filed a petition to dismiss Ojeda's application; (ii) On August 26, 1991, Houston filed a second petition to dismiss Ojeda's application; and, (iii) on September 10, 1991, Houston filed a third petition to dismiss Ojeda's application.[1]

3. *Houston.* In the petition to reconsider the return of her application, Houston alleges that: (i) she requested the forms on June 14, 1991 and did not receive them until late July; (ii) in the meantime, through her contact with the Commission, she was informed by an Information Specialist that since the engineering portion of the application had been completed, she should file that portion, and file the remaining parts as soon as the complete FCC Form 301 was received; and (iii) she then filed those sections and, upon receipt of the forms from the FCC, filed the complete application as soon as possible. Houston further alleges that the Commission returned her incomplete application on August 7, 1991, not realizing that the missing sections had been filed.

4. Houston attempts to shift the responsibility to file a substantially complete application to the Commission for its alleged delay in sending FCC Form 301 to her. The fact that Houston requested FCC Form 301 on June 14, 1991, with the window closing on July 5, 1991 suggests that had Houston requested the form in a more timely manner, she would have had ample time to prepare and file the complete form. Under the Commission's "hard look" FM processing policy, Houston's incomplete application was properly returned as not acceptable for tender. *FM Application Processing,* 50 Fed. Reg. 19936, 19945. (1985) *recon. denied, Memorandum Opinion and Order,* 50 Fed. Reg. 53157 (1985). Houston filed the application with the entire legal qualifications portion omitted, and her attempt to resubmit the complete application after close of the filing window was an impermissible attempt to cure a tenderability defect. *See also* 47 C.F.R. § 73.3522 (a)(6) and 73.3564(a).[2]

5. The "hard look" FM processing policy has been strictly applied by the Commission. In *Lauderdale-Mckeehan Christian Broadcasting Corp.,* 4 FCC Rcd 8095 (1989), the Commission held that "a petition for reconsideration of a finding of untenderability ... must demonstrate that findings of fact and/or conclusions of law concerning the tenderability of the application as originally filed were erroneous," citing *FM Applications Processing, supra,* and 47 C.F.R. § 1.106(d)(2) (emphasis omitted). Houston's incomplete application was properly returned by the staff. Additionally, we do not believe that the advice of an unnamed "information specialist" should stop the Commission from applying the "hard look" processing rules in effect at the time Houston's application was filed. The Commission has stated previously, and we emphasize again, that interested parties have the obligation to ascertain facts from official Commission records and files and may not rely on inquiries to the staff. *See, e.g., Texas Media Group, Inc.,* 5 FCC Rcd 2851, *aff'd sub nom. Malkan FM Associates v. FCC,* 935 F. 2d 1313 (D.C. Cir. 1991); *220 Television, Inc.,* 81 FCC 2d 575 (1980), *Camelot, Inc.,* 61 FCC 2d 15 (1976). To accept Houston's argument would "enable an applicant to unjustifiably shift a responsibility that is properly its own to the Commission staff." *M&C Broadcasting, Inc.,* FCC 85-217, Mimeo no. 35777 (released April 29, 1985) p.4.

6. *Ojeda.* In her first petition to dismiss Ojeda's application, Houston alleges that Ojeda failed to comply with the public notice requirements contained in 47 C.F.R. § 73.3580. She states that she conducted an intensive search for the public notice in the local daily newspaper and has confirmed that no such public notice was requested or published on behalf of Ojeda. Additionally, since Ojeda certified compliance within the application submitted to the Commission (Section VII, Question #1, Page 24, FCC Form 301), and since the required public notice serves to inform the citizens of the community of the applicant's intent and location of the local public file, Houston be-

[1] An opposition to the petition to reconsider was filed by Ojeda on October 2, 1991; an opposition to the August 13 petition to dismiss was filed by Ojeda on August 27, 1991; a consolidated opposition to the second and third petitions to dismiss was filed by Ojeda on September 25, 1991; and comments in opposition to Ojeda's response were filed on October 30, 1991.

[2] The Commission recently modified the "hard look" processing rules, and made these revised rules effective as of August 7, 1992. *Report and Order, Commercial FM Broadcast Applications,* 7 FCC Rcd 5074(1992). The Commission determined that applications filed prior to that date would continue to be processed under the rules in effect on the date of the application's receipt.

lieves that Ojeda omitted this obligation intentionally in order to allow the time for comment and response to the Commission to expire.

7. In Houston's second petition to dismiss Ojeda's application, she alleges that Ojeda falsely represented that D. Kirk Edens, Executive Vice President of the United New Mexico Bank, has committed to lend $60,000.00 to construct and operate the new FM station. Houston states that the United New Mexico Bank has neither loaned nor committed to lend any money for this purpose, and submitted an affidavit of Attorney Glen L. Houston to support this allegation. Houston further alleges that Ojeda's representations that $100,000.00 would be necessary to construct and operate the facility for three months, that $40,000.00 of this would come from its own funds, and that the remainder would come from the United New Mexico Bank, constitute material misrepresentations.

8. In her third petition to dismiss Ojeda's application, Houston alleges that in Section V-B, of FCC Form 301 of Ojeda's application, the 60 dbu contour lies within the 70 dbu contour as shown on the USGA 1:250,000 map annexed as "Figure 5A" to the engineering section of the application, and the population figures could therefore be incorrect.

9. We find Houston's petition to dismiss Ojeda's application due to noncompliance with the public notice requirement to be without merit. Ojeda's publication of the local notice after the 30-day time period specified in Section 73.3580 is not a disqualifying defect. The Commission has consistently permitted an applicant who has not complied with the rule to publish its local notice late. *See, e.g., United Broadcasting Co. of Eastern Maryland, Inc,,* 51 RR 2d 1393 (1982). Local notice of the filing of Ojeda's application was published in the *Hobbs Daily News-Sun* on August 16, 1991, as well as on August 20, 21, 22, 1991, some 17 days after the 30-day period established by Section 73.3580. *See* Opposition to Petition to Dismiss, at 3. Houston has demonstrated no harm resulting form Ojeda's failure to publish its local notice in a timely manner and comments or objections by Hobbs residents notified by the late local notice would have been duly considered. None was submitted.

10. In response to Houston's second petition to dismiss, Ojeda argues that she was financially qualified based upon discussions with the United New Mexico Bank and a letter that she had acquired from the bank prior to filing the application. Additionally, Ojeda contends all that is required is "reasonable assurance" of financing, and that there exists written documentation supporting the claim of "reasonable assurance" at the time the application was filed, which need not be submitted with the application. *See* Ojeda's September 25, 1991 opposition, at 3. By letter dated August 24, 1992, the staff requested that Ojeda submit the referenced bank letter, along with any other pertinent material confirming her arrangement with the bank, in the form of an amendment to Ojeda's application. On September 10, 1992, Ojeda filed an amendment in which she submitted a letter dated July 1, 1991 from United New Mexico Bank. This letter simply states that: (i) Mr. and Mrs. Ojeda have visited the bank about a loan and Mr. Ojeda estimated that he will need a total of $100,000.00; (ii) he will have a strong cash equity contribution into this project; and (iii) this "speaks very favorably for them and will be considered a strong plus" as the bank looks further into their loan application. Ojeda also submitted a letter dated September 16, 1991 from the United New Mexico Bank in which the bank provided "reasonable assurance" of its willingness to consider a loan to the Ojedas in the amount of $80,000.00. However, this September 16 letter was received from the bank after the Ojeda application was filed on July 5, 1991.

11. An applicant is required to have "reasonable assurance" of financing before it certifies its financial qualifications. It may not make the certification and then arrange financing. *Pepper Schultz,* 103 FCC 2d 1052 (Rev. Bd. 1986). This does not require that the applicant have written documentation when it certifies its financial qualifications, so long as the applicant actually has reasonable assurance of adequate funds at the time of certification, it may prepare supporting documentation after certification. *Northampton Media Associates, Inc.,* 4 FCC Rcd 5517 (1989), *recon. denied* 5 FCC Rcd 3075 (1990). Here, Ojeda indicates that it relies on the July 1 letter to demonstrate its pre-certification "reasonable assurance" of financing. However, that document, in connection with the September 16 letter for the United New Mexico Bank, demonstrates that Ojeda may not have had *any* assurance of funding from the Bank at the time of the certification. Rather, she had applied and the bank was "looking further" into her loan application. We will therefore designate Ojeda's application for hearing and appropriate issues will be specified.

12. Finally, Houston's third petition to dismiss is without merit. On September 19, 1991, Ojeda filed an amendment which indicated that the 70 dbu and 60 dbu contours on the USGA 1:25 0,000 map had been inadvertently mislabeled (switched). This amendment was filed during the amendment-of-right period. *See* 47 C.F.R. § 73.3522(a)(6).

13. Except as is indicated by the issues specified below, the applicant is qualified to construct ad operate as proposed. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the application of Ojeda Broadcasting, Inc. IS DESIGNATED FOR HEARING IN A PROCEEDING to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues.

1. To determine whether or not Ojeda was financially qualified at the time she filed her application.

2. To determine, in light of the evidence adduced pursuant to issue 1 above, whether Ojeda misrepresented facts or lacked candor with the Commission in certifying its financial qualifications.

3. To determine, in light of the evidence adduced pursuant to issues 1 and 2 above, whether Ojeda possesses the basic qualifications to be a licensee of the facilities sought herein.

14. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Rosemary Houston IS DENIED; the petition to dismiss Ojeda's application filed by Rosemary Houston IS DENIED; the third petition to dismiss Ojeda's application filed by Rosemary Houston IS DENIED; and, the second petition to dismiss Ojeda's application filed by Rosemary Houston IS GRANTED to the extent indicated above, and IS DENIED in all other respects.

15. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the

Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail itself of the opportunity to be heard, the applicant shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicant shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-44

In re Applications of

RURAL INITIATIVES FOR SHELTER AND EDUCATION (hereafter "Rural") — File No. BPED-870817MC

AMERICAN INDIAN BROADCAST GROUP, INC. (hereafter "Group") — File No. BPH-870820MB

For Construction Permit
for a New FM Station on Channel 279A (103.7 MHz)
in Hartford, Michigan

HEARING DESIGNATION ORDER

Adopted: February 23, 1993; Released: March 8, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Rural.* Rural proposes a tower site 161.8 kilometers from the licensed site of FM Station WEZW, Channel 279B, Wauwatosa, Wisconsin. Pursuant to Section 73.207 of the Commission's Rules, Rural's site must be at least 163 kilometers from WEZW's. Thus, Rural's proposal is short-spaced by approximately 1.2 kilometers. In light thereof, Rural requests a waiver of the rule. In support of its request, Rural asserts that a grant would permit noncommercial operations on an existing tower, thereby saving the nonprofit applicant "substantial" sums which would otherwise be expended on construction and land acquisition. According to Rural, the public interest would benefit if it were able to devote these savings to enhanced programming. Further, Rural asserts that the resultant overlap between its 34 dbu contour and WEZW's 54 dbu contour would occur entirely over Lake Michigan, and, accordingly, the policy underlying the separation standards would not be undercut.

3. The Commission determined that the minimum mileage separation standards, as embodied in the table of frequency allotments set forth in 47 C.F.R. 73.207, offered the best means for achieving an orderly, efficient, and effective development of the commercial FM broadcast service. *First Report and Order in Docket 14185*, 33 FCC 309 (1962). An applicant requesting a waiver of the separation standards must first demonstrate that other, conforming, sites are unavailable. It must also demonstrate that a grant would further the public interest. *Townsend Broadcasting Corp.*, 62 FCC 2d 511 (1976). The threshold showing, however, is not necessary where the proposed short-spacing is *de minimis*, or no more than one mile. *See Baltimore Radio Show, Inc.*, 5 FCC Rcd 3712 (1990). Insofar as Rural proposes a mere 1.2-kilometer short-spacing, the *de minimis* criterium is satisfied, and the need for the threshold showing is obviated. *See, e.g., Kenter Broadcasting Company*, 62 RR 2d 1573, 1577 n.9 (1986), *affirmed*, 816 F. 2d 8 (D.C. Cir. 1987) (*per curiam*).

4. The Commission has recognized benefits to the public interest arising out of short-spaced proposals, such as the avoidance of environmental questions. 5 FCC Rcd 3712. It has also noted the public interest benefits of co-locating transmission facilities. *Beasley Broadcasting of Philadelphia, Inc. (WXTU)*, 100 FCC 2d 106 (1985).[1] Here, as in *Beasley*, an evaluation of all relevant factors tilts the balance in favor of a grant of the requested waiver, and it will be granted below.

5. Section II, Item 7 of the FCC Form 340 (May 1985) filed by Rural Zasks whether documents, instruments, agreements or understandings for the pledge of stock of a corporate applicant, as security for loans or contractual performance, provide that: (a) voting rights will remain with the applicant, even in the event of default on the obligation: (b) in the event of default, there will be either a private or public sale of the stock; and (c) prior to the exercise of stockholder rights by the purchaser at such sale, the prior consent of the Commission will be obtained. A negative response requires attachment of an Exhibit providing a full explanation. Rural answered Item 7 in the negative, but failed to provide the requisite explanation. Accordingly, it will be required to do so below.

6. Rural's application contains a discrepancy between the tower height above ground level ("AGL") listed in Section V-B, Item 9 and the value on file with the Commission for the tower proposed by Rural for its antenna, that of WEZW, Wauwatosa, Wisconsin. Specifically, in Section V-B, Item 9, Rural specified the tower height AGL as 316 meters. However, according to the Commission's records, the tower height AGL of the WEZW tower is 100 meters and the tower height above mean sea level ("AMSL") is 316 meters. We note that the application's tower sketch, submitted as Engineering Exhibit E-3, lists the tower heights as 100 meters AGL and 316 meters AMSL. Since the application specifies an existing tower for which data are on file with the Commission, this discrepancy constitutes neither an acceptability nor a tenderability defect and may be corrected by an amendment. Rural will be directed to file such an amendment below. Furthermore, because the discrepancy concerns tower height AGL, an air hazard issue will be designated against Rural in this Order. Should Rural timely file a corrective amendment, the Judge may dismiss the issue.

7. *Group.* Pursuant to 47 C.F.R. § 1.65 requires that applicants maintain the continuing accuracy and completeness of their proposals with respect to all matters which may be of decisional significance. Group filed several amendments detailing the status of its other media interests, the latest being filed on July 18, 1990. However,

[1] In *Beasley*, the Commission discussed the benefits of *de facto* antenna farms. Although Rural does not mention an antenna farm, the benefits to the public of co-locating on an existing tower appear similar.

dispositive action has since been taken on several of Group's then-pending proposals. For example, its application for a new FM station in San Angelo, Texas, (File No. BPH-870921MB) was granted on January 25, 1991, and its application for a new FM station in Vero Beach, Florida (File No. BPH-880523MF) was dismissed on January 2, 1991. Accordingly, Group will be required to file an amendment listing its current media interests.

8. As stated previously, Rural proposes to sidemount its antenna on the existing tower of station WEZW, Wauwatosa, Wisconsin; Group proposes to construct a new tower. Our engineering study indicates that both proposals may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that (applicant) may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Specifically, Rural has not indicated how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, and Group has not submitted the requisite agreement among WEZW tower users with respect to how such workers will be protected. Accordingly, both applicants will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally,* OST BUlletin No. 65, (October 1985) entitled "Evaluation Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation," at 28. Accordingly, both applicants will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.,* 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.,* 83 FCC 2d 337 (1980).

9. The applicant below has petitioned for leave to amend its application on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
Group	April 28, 1988; July 11, 1988; October 27, 1988; February 17, 1989; June 1, 1989; August 8, 1989; September 7, 1989; October 27, 1989; April 13, 1990; July 18, 1990.

10. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by Group would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Rural and Group in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by the Rural and Group would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That Rural's request for waiver of 47 C.F.R. § 73.207 IS GRANTED.

14. IT IS FURTHER ORDERED, That Rural shall file amendments providing the requisite explanation for its negative response to Section II, Item 7, FCC 340 (May 1985) and correcting the discrepancy in tower height above ground level with the presiding Administrative Law Judge within 30 days of the release of this Order.

15. IT IS FURTHER ORDERED, That Group shall submit an amendment which details each of its media interests with the presiding Administrative Law Judge within 30 days after the release of this Order.

16. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Group ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

17. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

18. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20054. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20054.

19. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties which have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (*see* Section 1.325(c)(1) of the Rules; and (b) the Standardized integration Statement (see Section 1.325(c) of the Rules), which must also be filed with the presiding officer. Failure to serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 168 (1990), *erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

20. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-41

In re Applications of

TRIAD FAMILY NETWORK, INC.
(hereafter "Triad")
Winston-Salem, North Carolina
Channel 207C3 — File No. BPED-910227MD

POSITIVE ALTERNATIVE RADIO, INC.
(hereafter "Radio")
Asheboro, North Carolina
Channel 207A — File No. BPED-911119MC

For Construction Permit
for a New Noncommercial
Educational FM Station

HEARING DESIGNATION ORDER

Adopted: February 23, 1993; Released: March 9, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new, noncommercial, educational FM station.[1]

2. *Triad.* Our engineering study based upon OST Bulletin No. 65, October, 1985 entitled "Evaluating Compliance with Specific Guidelines for Human Exposure to Radiofrequency Radiation" reveals that the ANSI radiofrequency radiation limit may be significantly exceeded in the area immediately surrounding Triad's tower base. *See generally* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that Triad may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). *See also Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307(b) states that an EA must be prepared if the proposed operation would cause exposure exceeding specific standards to workers or to the general public. Since Triad has failed to indicate adequately how the general public or how workers engaged in maintenance and repair on the tower would be protected from exposure to levels exceeding the ANSI guidelines, it will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally* OST Bulletin No. 65, *supra,* at 28. Such showing should include a calculation of the total contribution of radiation from the proposal and from Stations WPIP(AM) and WBFJ(AM); it should also specify the height and the distance from the tower base of any fence that must be erected. Our calculations indicate that the fence must be at least 5 meters from the base of the tower. If Triad intends to construct the fence at a lesser distance, the showing must include the basis of the calculations (*i.e.,* antenna type, measurements, etc.). We also note that Triad's amendment of October 24, 1991 referred to a fence, but failed to specifically state the distance from the base of the tower to the fence. Accordingly, Triad will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.,* 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.,* 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that Triad's proposal will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted, and the presiding judge shall thereafter not consider the environmental effects of Triad's proposal. *See* 47 C.F.R. § 1.1308(d).

3. *Radio.* Our engineering review of the Radio application as amended on August 10, 1992 reveals a discrepancy in the composite directional antenna radiation pattern. The August 10, 1992 amendment was submitted in order to bring the application into compliance with 47 C.F.R. § 73.316(c)(2). That section states, in pertinent part, that "[t]he plot of the pattern must be oriented such that corresponds to the direction of maximum radiation...." Al-

[1] On August 11, 1992, Triad filed a petition to deny the Radio application. The petition to deny is essentially a petition to specify issues. Since the Commission's *Report and Order* in Gen. Docket No. 79-137, *Revised Processing of Broadcasting Applications,* 72 FCC 2d 202, 212-215 (1979), directed the deletion of all issue pleadings in pending cases, the matters sought to be raised in the petition has not been considered. Instead, an opportunity to raise any allegations contained therein will be afforded the parties post-designation pursuant to Section 1.229. Also, on November 9, 1992 and January 19, 1993, respectively, Stations WXYC(FM), Chapel Hill, North Carolina, and WSOE(FM), Elon College, North Carolina, filed essentially identical informal objections against the Radio application. The objectors allege that the Radio application would cause interference to the current facilities of WXYC and WSOE, but they include no technical evidence to support this allegation. According to our studies, the Radio application would cause no interference to either station and thus satisfies the prohibited overlap provisions of 47 C.F.R. § 73.509. In addition, the objectors question Radio's financial qualifications but have offered no specific showing raising any substantial and material question of fact as to those qualifications. Therefore, we find the objections to be without merit.

though the amendment satisfied this requirement, it failed to include the rotation angle of the pattern with respect to True North. Based on the information included in the original application, we believe that the directional antenna pattern given in the August 10, 1992 amendment was intended to be rotated 220^0 with respect to True North. Accordingly, Radio must submit an amendment curing this discrepancy.

4. In addition, on February 9, 1993, Radio submitted an engineering amendment proposing to change its transmitter site. In its cover letter, Radio claims "good cause" for its post-"B" cut-off amendment. It states that, in securing "reasonable assurance" for its original WKXR(AM) site, Radio was assured, with respect to costs, that "I'll treat you right." Subsequently, Radio was informed that the site rent would be $1200 per month, which exceeds its financial means. Because we do not find this showing sufficient to demonstrate good cause for the amendment, *see Erwin O' Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970), we will return the amendment.

5. *Share-time Arrangement.* None of the applicants have indicated that an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (October 24, 1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement among themselves.

6. *Section 307(b) and Contingent Comparative Issues.* The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to 47 U.S.C. § 307(b), which of the proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

7. Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University,* FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available non-commercial educational FM signals within the respective service areas.

8. *Conclusion.* Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. ACCORDINGLY, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Triad in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the respective proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine: (a) the number of other reserved channel non-commercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would better provide a fair, efficient and equitable distribution of radio service.

3. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That, in accordance with paragraph 2 hereinabove, Triad shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

11. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Radio shall file the amendment specified in paragraph 3 above and serve a copy of it upon the presiding Administrative Law Judge.

12. IT IS FURTHER ORDERED, That the amendment filed on February 9, 1993 by Radio IS RETURNED.

13. IT IS FURTHER ORDERED, That, in accordance with note 1 hereinabove, the petition to deny filed on August 11, 1992 by Triad IS DISMISSED, and the informal objections filed on November 9, 1992 and January 19, 1993 by Stations WXYC(FM) and WSOE(FM), respectively, ARE DENIED.

14. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief,

Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-42

In re Applications of

MOONBEAM, INC. File No. BPH-911115MG
(hereafter "Moonbeam")

GARY E. WILLSON File No. BPH-911115MO
(hereafter "Willson")

For Construction Permit for a
New FM Station on Channel 265A
in Calistoga, California

HEARING DESIGNATION ORDER

Adopted: February 23, 1993; Released: March 8, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Moonbeam proposes to sidemount its antenna on the existing KFTY-TV tower and Willson proposes to build its tower adjacent to the existing KCDS(FM) and KLVR(FM) towers. An engineering review of the applications reveals that both Moonbeam and Willson did not sufficiently address the issue of potential occupational hazards caused by the proposed facilities. Pursuant to OST Bulletin No. 65, October 1985, entitled "Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation," when persons have access to the site, the transmitter power must be reduced or completely eliminated in order to comply with FCC guidelines. In situations like Moonbeam's and Willson's, where there are multiple contributors to radiofrequency radiation, all stations are required to reduce power or cease operations as necessary to assure safety with respect to radiofrequency radiation with regard to persons having access to the site. Accordingly, any subsequent grant will be subject to the following condition:

> The permittee/licensee in coordination with other users of the site must reduce power or cease operations as necessary to protect persons having access to the site, tower or antenna from radiofrequency radiation in excess of FCC guidelines.

3. Moonbeam petitioned for leave to amend its application on November 3, 1992. The accompanying amendment was filed after March 2, 1992, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

4. Section II, Item 6 of FCC Form 301 (June 1989) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Moonbeam has not completed Item 6 correctly in that it gives "Shoot the Moon" as the residence address for Mary F. Constant and "Hyndman Lane" as the residence address for Pat Van Paepeghum. Accordingly, Moonbeam must submit an amendment which gives all the information required by Section II, Item 6 to the presiding Administrative Law Judge after this Order is released.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine which of the proposals would, on a comparative basis, better serve the public interest.
>
> 2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Moonbeam IS GRANTED, and the corresponding amendment IS ACCEPTED to the extend indicated herein.

8. IT IS FURTHER ORDERED, That Moonbeam shall submit an amendment which contains the information required by Section II, Item 6 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

9. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules,

within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 90-217

In the Matter of

Establishment of Procedures
to Provide a Preference to
Applicants Proposing an
Allocation for New Services

MEMORANDUM OPINION AND ORDER

Adopted: February 24, 1993; Released: March 8, 1993

By the Commission: Commissioner Marshall not participating.

I. INTRODUCTION

1. In this *Memorandum Opinion and Order,* we deny petitions for further reconsideration of our pioneer's preference rules filed by TRW, Inc. (TRW) and Loral Qualcomm Satellite Services, Inc. (Loral).[1] Specifically, we affirm that the rules are consistent with the Supreme Court's *Ashbacker* decision, which provides that where "two *bona fide* applications are mutually exclusive," they are entitled to comparative consideration.[2]

II. BACKGROUND

2. The pioneer's preference rules established a two-track system for processing applications for certain new services. Specifically, an applicant that demonstrates that it "has developed an innovative proposal that leads to the establishment of a service not currently provided or an enhancement of an existing service" will be placed on a pioneer's preference track, and will not be subject to competing applications. Thus, if otherwise qualified, such an applicant will receive a license.[3] Other applicants, including both those that unsuccessfully applied for a preference and those that did not, will compete for the remaining licenses on a separate track.[4]

3. The rules are designed to further the statutorily recognized public interest goal of encouraging the development of new technologies and services.[5] The Commission found that the rules would further these goals by "foster[ing] a host of valuable new technologies and services for the public" through reducing regulatory burdens that may inhibit innovators from presenting their proposals to the Commission in a timely manner and instead providing positive incentives for innovators.[6] The rules are designed to ensure "that as future pathbreaking . . . new technologies and services are introduced worldwide . . . American consumers have the early benefit of these technologies and services."[7]

4. Based on these strong public interest benefits, the Commission concluded in the *Pioneer's Preference Order* that the rules did not conflict with *Ashbacker* because, in the *Storer* case,[8] "the Supreme Court has indicated that when adequately supported by the record in a rule making proceeding, the Commission may establish threshold standards that applicants must satisfy before they are entitled to be eligible for comparative consideration."[9] The Commission also relied on a United States Court of Appeals decision affirming a decision by the Federal Energy Regulatory Commission (FERC) to establish a two-track application system.[10]

5. While petitions for reconsideration of the *Pioneer's Preference Order* were filed, no one challenged the lawfulness of the rules under *Ashbacker.* TRWP and Loral now argue on further reconsideration that the rules are, in fact, inconsistent with their right to comparative consideration under *Ashbacker.*[11] TRW and Loral are supported by the National Association of Broadcasters, and opposed by Mobile Telecommunication Technologies Corporation, Motorola, Inc., and American Personal Communications.[12]

III. DISCUSSION

6. We continue to believe that our pioneer's preference rules are a valid exercise of our rulemaking authority. It is well-established under the *Storer* line of cases that an agency may limit *Ashbacker* or other statutory hearing rights by rules establishing threshold eligibility standards designed to serve the public interest. *See, e.g., Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos.,* 111 S.

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[1] *See Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, Report and Order,* 6 FCC Rcd 3488 (1991) (*Pioneer's Preference Order*), *recon. granted in part, denied in part,* 7 FCC Rcd 1808 (1992) (*Pioneer's Preference Recon. Order*).

[2] *Ashbacker Radio Corp. v. FCC,* 326 U.S. 327, 333 (1945).

[3] 47 C.F.R. §§ 1.402(a), (b).

[4] A pioneer's preference will not be granted unless there is sufficient spectrum to permit at least one additional license to be granted for the same geographic area. *See Pioneer's Preference Order,* 6 FCC Rcd at 3490 (preferences will "not exclud[e] others who also wish to provide the service"); *Pioneer's Preference Recon. Order,* 7 FCC Rcd at 1809 ("the preference holder will face competition from other service providers"). This fact answers Loral's question of how a recipient of a nationwide preference could be subject to competition. *See* Loral Petition at 2-3; Loral Reply at 9.

[5] *See* 47 U.S.C. §§ 157(a), 303(g).

[6] *Pioneer's Preference Order,* 6 FCC Rcd at 3490.

[7] *Id.*

[8] *United States v. Storer Broadcasting Co.,* 351 U.S. 192 (1956).

[9] *Pioneer's Preference Order,* 6 FCC Rcd at 3492 & n.5.

[10] *Id.* (citing *Public Utilities Comm'n of California v. FERC,* 900 F.2d 269 (D.C. Cir. 1990)).

[11] While the petitions could be dismissed pursuant to § 1.429(i) of our Rules, we will consider them on the merits in order to remove any uncertainty about the legal basis for the rules. Similarly, we will grant TRW's Motion for Leave to File Supplement to Petition for Reconsideration.

[12] In addition, PerTel, Inc. has asked for clarification that a tentative pioneer's preference may be awarded in connection with a further notice of proposed rule making as well as a notice of proposed rule making. We hereby clarify that, since a further notice falls within the category of a notice, it is covered by the rule.

Ct. 615, 625-26 (1991); *Heckler v. Campbell*, 461 U.S. 458, 467-68 (1983); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202-05 (1956); *Nuclear Information Resource Service v. NRC*, No. 89-1381, slip op. at 13-16 (D.C. Cir. July 17, 1992) (en banc); *Altamont Gas Transmission Co. v. FERC*, No. 91-1084, slip op. at 5 (D.C. Cir. June 9, 1992); *Rainbow Broadcasting Co. v. FCC*, 949 F.2d 405, 409 (D.C. Cir. 1991); *Public Utilities Comm'n of California v. FERC*, 900 F.2d 269, 277-280 (D.C. Cir. 1990); *Hispanic Information & Telecommunications Network, Inc. v. FCC*, 865 F.2d 1289, 1294-95 (D.C. Cir. 1989).[13] As the United States Court of Appeals for the District of Columbia Circuit recently stated in an en banc decision that reviewed relevant Supreme Court precedent:

> Time and again, "[t]he Court has recognized that even where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration." . . . "[A]p contrary holding would require the agency continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding."[14]

7. We believe our pioneer's preference rules fit comfortably within this body of case law. The rules establish a threshold eligibility criterion for participation on a pioneer's preference track. Applicants who demonstrate that they meet the requirements for a preference will be placed on this track and not be subject to competing applications.[15] Applicants who do not meet the requirements for a preference or who did not request a preference will be placed on a separate track and compete for the remaining licenses.[16] Having made the determination in a rulemaking proceeding that it serves the public interest to reward innovators by placing them on a separate track for a license, the Commission simply is not required to "relitigate" this determination in specific cases.[17] In this regard, the pioneer's preference rules are closely analogous to FERC's "optional expedited certificate" rules, which also established a two-track system for processing applications. In upholding those rules, the D.C. Circuit stated:

> Of course if *Ashbacker* applied literally to the Commission's dual track procedures, the pipelines' claim would succeed . . . . But *Ashbacker* cannot intelligibly be understood to require that an agency consolidate into a single comparative hearing applications that are proceeding on legitimately established separate tracks. . . . Indeed, such a principle would destroy *any* agency's decision to streamline adjudicatory procedures for a specially defined class of applicants: if the tortoises are entitled to engulf the hares in their proceedings, they can destroy the fast track's speed and thus its existence as a fast track. The *Ashbacker* principle takes this into account, requiring only that an agency "use the same set of procedures to process the applications of all *similarly situated* persons who come before it seeking the same license."[18]

8. The fact that the pioneer's preference rules apply in some circumstances to applications pending at the time the rules were adopted does not affect their validity.[19] We also reject the suggestion that the *Storer* line of cases does not apply here because, before awarding a pioneer's preference, the Commission must examine the particular facts presented by the requester to determine whether the standard

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[13] Even in *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428 (D.C. Cir. 1991), a case on which TRW and Loral rely heavily, the court explicitly recognized this exception to the *Ashbacker* doctrine, although it found that the Commission had not justified all of its rules. *Id.* at 439, 452-53. Without regard to the validity of the court's decision that the Commission had not justified the rule in the *Aeronautical Radio* case, we note that the pioneer's preference rules do not "prohibit[] license applicants from pursuing their individual applications . . . ." *Id.* at 452.

[14] *Nuclear Information Resource Service v. NRC*, slip op. at 14 (quoting *Mobil Oil*, 111 S. Ct. at 626 and *Heckler v. Campbell*, 461 U.S. at 467). *See also id.* at 13 ("Significantly, the Supreme Court has found agency reliance on prior determinations to be perfectly acceptable even when the statute before it plainly calls for individualized hearings and findings.").

[15] It is extremely unlikely that any applications on a pioneer's preference track would be mutually exclusive with each other. Nevertheless, to the extent this were to occur, we would proceed with comparative consideration of such applications by the same method we select among other competing applications, i.e., hearing or lottery.

[16] *See* note 4, *supra*. In this regard, the pioneer's preference rules are more favorable to applicants who do not meet the threshold requirements than the rules upheld in *Rainbow*, which eliminated the ability of all but incumbent broadcasters to apply for certain frequencies. Even in that situation, the court noted that the Supreme Court in *Ashbacker* "never said that the Commission must open a frequency for competing applications whenever it assigns a frequency . . . ." 949 F. 2d at 409.

[17] *Nuclear Information Resource Service*, slip op. at 14. *See also Hispanic Information & Telecommunications Network*, 865 F.2d at 1294 ("The Commission surely is not obligated to rethink its policies on each occasion that it applies them to a particular set of facts; this would eviscerate the agency's rulemaking authority."). We thus reject Loral's suggestion that, even after completion of a rulemaking proceeding, *Ashbacker* requires the Commission in each case to determine whether there are public interest factors that would outweigh the pioneer's preference. *See* Loral Reply at 5-7. This repetitive inquiry is precisely what rules of general applicability are designed to avoid. In a particular case, of course, a non-pioneer's preference applicant is free to request a waiver of the pioneer's preference rules if good cause exists for it to be considered mutually exclusive with a preference recipient. *See* 47 C.F.R. § 1.3.

[18] *Public Utilities Comm'n of California*, 900 F.2d at 278 (emphasis in original) (quoting *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1555 (D.C. Cir. 1987)). In apparent disagreement with the D.C. Circuit, TRW states that the *Maxcell* decision is "inapposite" to the issues here. TRW Reply at 14. As for *Public Utilities Comm'n of California*, one of the two court cases cited for support in our adoption of the rules, 6 FCC Rcd at 3500 n.5, TRW finds that case "inapplicable" because, in its view, it related only to non-similarly situated applicants. TRW Petition at 15, n.14. TRW misses the point, however. An applicant awarded a pioneer's preference is *not* similarly situated with other applicants because, unlike the other applicants, it "has developed an innovative proposal that leads to the establishment of a service not currently provided or an enhancement of an existing service." 47 C.F.R. § 1.402(a).

[19] *See Hispanic Information & Telecommunications Network*, 865 F.2d at 1294-95. It appears that TRW concedes this point. *See* TRW Reply at 12; *but see* TRW Petition at 13; TRW Supplement at 11; Loral Reply at 3.

for a preference set forth in the rules is met.[20] The application of any threshold eligibility requirement involves an examination of the facts to determine if the relevant legal standard is met. Thus, for example, in cases applying the broadcast multiple ownership rules, the Commission still must determine, based on the facts before it in a specific case, whethercertain interests are attributable and therefore in violation of the rules.[21] Contrary to TRW's suggestion,[22] we believe the pioneer's preference standard is sufficiently clear and objective that it will not be unusually difficult to determine in particular cases whether an applicant has met the standard. While there doubtlessly will be some disputes "about the legal implication" of facts contained in particular pioneer's preference requests, i.e., whether they meet the standard set forth in the rule, a hearing on such legal disputes would be "pointless" and is not required.[23]

9. Finally, we affirm our conclusion that there is a strong public interest basis for the pioneer's preference rules.[24] As noted in paragraph 2 above, the rules will encourage innovation and more rapid delivery of new services and technologies to the public, consistent with congressional goals explicitly incorporated into the Communications Act.

IV. CONCLUSION AND ORDERING CLAUSES

10. In sum, we conclude that our pioneer's preference rules do not violate *Ashbacker* and are fully justified under applicable case law.

11. Accordingly, IT IS ORDERED THAT the petitions for further reconsideration filed by TRW, Inc. and Loral Qualcomm Satellite Services, Inc. ARE DENIED.

12. IT IS FURTHER ORDERED THAT the Petition for Clarification filed by PerTel, Inc. IS GRANTED.

13. IT IS FURTHER ORDERED THAT the Motion for Leave to File Supplement to Petition for Reconsideration filed by TRW, Inc. IS GRANTED.

14. IT IS FURTHER ORDERED THAT this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[20] *See* TRW Supplement at 8-10; TRW Reply at 6-7.

[21] *See* 47 C.F.R. § 73.3555 Note 2.

[22] TRW Reply at 10-11.

[23] *See Singleton v. FCC*, No. 91-1076, slip op. at 10 (D.C. Cir. Jan.17, 1992); *Hispanic Information & Telecommunications Network*, 865 F.2d at 1294 ("Given the absence of disputed factual issues, no *Ashbacker* hearing is necessary. Such a hearing would either require FCC reconsideration of established policy, or else it would be a pointless formality in which the result was preordained."). We do not anticipate that significant disputes will arise over the facts themselves that cannot be resolved using our standard procedures. To the extent, however, that there are substantial and material questions of *fact* in connection with an entity's request for a pioneer's preference, a hearing would be appropriate before ruling on the request. Such a hearing would not, however, be a comparative hearing.

[24] We believe our rules clearly meet the requirement that an agency have an "adequate" basis for limiting *Ashbacker* rights through rules. *See Altamont Gas*, slip op. at 5. Moreover, to the extent the "compelling" basis test set forth in *Aeronautical Radio*, 928 F.2d at 452, is correct and applicable here, we also believe our rules meet that standard as well.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

STARSYS Global Positioning, Inc. — File No. 33-DSS-P-90(24)

Request for a Declaratory Ruling Concerning Section 25.116 of the Commission's Rules

By the Domestic Facilities Division:

DECLARATORY ORDER

Adopted: February 22, 1993; Released: March 8, 1993

I. INTRODUCTION

1. STARSYS Global Positioning, Inc. (STARSYS) requests a declaratory ruling that the transfer of an ownership interest in the company will not affect the pendency of its application to construct, launch and operate a low-Earth orbit communications satellite system. STARSYS's request was placed on public notice on December 16, 1992.[1] Comments were filed by Orbital Communications Corporation (ORBCOMM)[2] and an Opposition was filed by LEOSAT Corporation (LEOSAT).[3] STARSYS replied to both pleadings.[4] For the reasons set forth below, we find that the transfer of control of STARSYS's Class A shareholder will not affect the pendency of its application.

2. STARSYS is an applicant to provide "non-voice, non-geostationary mobile-satellite services" (NVNG MSS) in the frequency bands below 1 GHz. The Commission has limited the number of applicants to be considered for initial licensing to those that properly filed applications on or before September 21, 1990.[5] Three applications, including STARSYS's, were timely filed in accordance with this "cut-off" date.[6]

3. ST Systems Corporation (STSC), a scientific and engineering services and computer systems company, is STARSYS's sole Class A shareholder. On September 30, 1991, STSC sold a substantial portion of its assets to Hughes STX Corporation (Hughes STX).[7] To assure the continued viability of the STARSYS application, however, STSC retained the ownership of its interest in STARSYS. STSC then granted Hughes STX an option to purchase that interest, conditioned specifically upon receipt of Commission consent to the acquisition.[8] Hughes STX now wishes to exercise its right to acquire STSC's interest in STARSYS. In accordance with the option terms, STARSYS seeks a declaratory ruling that an amendment to its application reflecting a transfer of STSC's interest in STARSYS to Hughes STX will not adversely affect the pendency of its NVNG MSS application.

II. DISCUSSION

4. Section 25.116(c) of our Rules states that an application will be considered to be a newly-filed application if it is amended by a "major" amendment.[9] after an announced cut-off deadline for the filing of applications. If STARSYS's proposed ownership amendment is considered to be a major amendment, as STARSYS alleges, its application could be considered newly-filed as of the date of that amendment. The application thus would not meet our September 1991 cut-off date for the filing of the initial round of NVNG MSS applications and would not be considered in the current processing group. There are, however, a number of exceptions to this general rule regarding the impact of post-cut-off major amendments. Specifically, Section 25.116(c)(2) notes that the filing of a major amendment will *not* cause the underlying application to be considered newly-filed if "[t]he amendment reflects only a change in ownership or control found by the Commission to be in the public interest and for which a requested exemption from a "cut-off" date is granted." Although only recently codified in Part 25 of the Commission's rules, this policy has been applied in past satellite proceedings.[10] Moreover, further guidance is afforded by examining identically worded exceptions in other parts of our rules.

5. The leading case applying this exception is *Airsignal International, Inc.*, 81 FCC 2d 472 (1980). Airsignal was a cellular radio applicant at the time that its parent company, WUI, Inc., was acquired by Xerox Corporation. Following the acquisition, Airsignal amended its applications to reflect the ownership changes, and sought an exemption from the major amendment and cut-off rules pursuant to Section 22.23(g)(3) of the Commission's rules.[11] The Commission concluded that the Airsignal amendment, although

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[1] *Public Notice* dated December 16, 1992 (FCC Report No. DS-1263).

[2] Comments of ORBCOMM on the Petition for Declaratory Ruling, dated October 14, 1992.

[3] Opposition to Petition for Expedited Declaratory Ruling, dated December 30, 1992.

[4] Reply Comments of STARSYS, dated October 21, 1992; Reply to Opposition to Petition for Expedited Declaratory Ruling, dated January 6, 1993.

[5] *Public Notice*, 5 FCC Rcd 4660 (CCB 1990).

[6] Applications submitted after September 21, 1990 will not be processed until processing of the initial group is completed.

[7] Hughes STX is a wholly-owned subsidiary of Hughes Aircraft Company (Hughes).

[8] According to STARSYS, the principals of STSC remain committed to the prosecution of the STARSYS application, regardless of the Commission's action on this request.

[9] An amendment will be considered "major" if it specifies a substantial change in ownership of an application such that the change would require, in the case of an authorized station, the filing of a prior assignment or transfer of control application under Section 310(d) of the Communications Act of 1934, as amended. 47 C.F.R. §25.116(b)(3). STARSYS asserts that STSC holds a controlling interest in the STARSYS application. ORBCOMM disagrees. We will not herein consider whether STSC's interest in the STARSYS application is "controlling." That issue will be addressed at the time that we take final action on STARSYS's application. For purposes of this discussion, we will assume, *arguendo*, that the STSC transfer to Hughes STX is a "major" amendment.

[10] *See* n.12, *infra*.

[11] The text of Section 22.23(g)(2) is identical to the text of Section 25.116(d)(2). Indeed, when it proposed the adoption of Section 25.116 (and other rules), the Commission noted that it

major, would not cause its application to be considered newly-filed. In doing so, the Commission focused on two considerations: (1) whether the transfer was made to effect a legitimate business purpose and (2) whether the change in ownership was in the public interest.[12]

6. We believe that the STARSYS situation falls squarely within the requested exception. Applying the *Airsignal* test here, we note initially that there is no indication that a primary purpose of the STSC acquisition was to obtain an interest in the STARSYS application. To the contrary, legitimate, independent business reasons existed for Hughes STX's acquisition of STSC's substantial assets. At the time of the Hughes acquisition, STSC was a companygenerating annual revenues of approximately $70 million, and employing more than 1100 people. In a press release issued shortly before the STSC acquisition, Hughes stated that the purchase of STSC assets arose from that company's expertise in information systems technology.[13]

7. We further believe that the public interest will be served by the acquisition of STSC's interest by Hughes STX.[14] Hughes, like STSC, has a distinguished track record in space communications technology, and will be able to provide STARSYS with valuable expertise, experience and perhaps financial strength. This could enhance STARSYS's ability to become a successful provider of low-Earth orbit communications services. Further, there is little potential for harm to the other applicants in this proceeding, as we believe that all applicants will be able to implement their proposed systems.[15]

8. LEOSAT does not oppose the grant of STARSYS's Petition *per se*. It does, however, urge that STARSYS be allowed to amend its ownership structure only if the company is not allowed to invoke any future comparative advantage arising from this proposed amendment.[16] We will not reach the potential comparative advantage issue here. STARSYS merely requests a ruling regarding the effect of Section 25.116 of our Rules on its proposed amendment. When STARSYS amends its application to reflect an actual ownership change, LEOSAT may raise these comparative concerns.

III. CONCLUSION

9. We find that the transfer of control of STSC to Hughes STX, if deemed a major amendment to the STARSYS application, will not affect the pendency of STARSYS's application in accordance with Section 25.116(c)(2) of our Rules.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.291 of the Commission's rules on delegations of authority, 47 C.F.R. §0.291, that the request of STARSYS Global Positioning, Inc. for a declaratory ruling IS GRANTED, and that the transfer of STSC's interest in the STARSYS application to Hughes STX will not result in a determination that the application is newly-filed pursuant to Section 25.116(c) of the Commission's rules. This action is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

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intended to codify already existing satellite policies and procedures. *See Notice of Proposed Rulemaking in Docket No. CC 86-496*, 2 FCC Rcd 762, 766 (1987).

[12] The considerations delineated in *Airsignal* were subsequently applied to an analogous satellite proceeding. *Se e Hughes Communications, Inc*, 59 RR2d 502 (CCB 1985) (General Motors Corp. permitted to acquire Hughes without dismissal of pending mobile-satellite service application of a Hughes subsidiary. Ownership change was found to be part of a larger business transaction, of which the MSS application represented only a small portion of the business activity, and acquisition found to be in the public interest.

[13] The nominal option price of $1.00 further indicates that the STARSYS interest was intended to be merely a part of the entire acquisition of STSC by Hughes STX.

[14] Based upon this finding, we believe that it would be in the public interest to waive, if necessary, the cut-off requirements applicable to STARSYS's application in accordance with Section 25.116(c)(2).

[15] *See* Report of the Below 1 GHz LEO Negotiated Rulemaking Committee, dated September 16, 1992 (CC Docket 92-76). We further believe that additional systems may be authorized in future processing rounds.

[16] LEOSAT also alleges that §25.116(c) of the Commission's rules does not apply to this situation because cut-off rules may not be applied to LEO satellite applications. We disagree. *See LEOSAT Corporation*, FCC 93-23, released January 28, 1993, at para. 15.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Cable & Wireless Communications, Inc. — File No. I-T-C-90-190

Application for Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to Resell Services of Other Common Carriers to Provide Private Line Services between the United States and International Points

ORDER AND CERTIFICATION

Adopted: March 1, 1993; Released: March 8, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the resale of international private lines for the provision of international private line services to the general public by Cable & Wireless Communications, Inc. (CWCI).[1]

2. Accordingly, IT IS ORDERED that application File I-T-C-90-190 IS GRANTED and CWCI is authorized to resell international private lines not interconnected to the public switched network for the provision of international private line services[2] between the United States and each of the forty-two (42) international points,[3] as specified in Appendix A.

3. IT IS FURTHER ORDERED that CWCI is authorized to lease and operate one-half interest in up to 124 56/64-Kbps equivalent circuits and in up to 46 T-1 circuits from authorized U.S. common carriers[4] for the provision of its authorized resale of international private lines for private line services, as specified in Appendix A.

4. IT IS FURTHER ORDERED that neither CWCI nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions which is denied to any other United States carrier by reason of any concession contract, understanding, or working arrangement to which CWCI or any such persons or companies controlling or controlled by CWCI are parties.

5. IT IS FURTHER ORDERED that CWCI shall file publicly:

(a) tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61; or

(b) a copy of any contracts entered into with other carriers or a contract summary in accordance with Section 203 of the Communications Act, 47 U.S.C. §203, and the *Interexchange Order*.[5]

6. IT IS FURTHER ORDERED that CWCI shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that CWCI, as a dominant carrier, shall request Section 214 authorization for all circuit additions to any of the herein authorized international points, pursuant to Section 63.01 of the Commission's Rules, 47 C.F.R. §63.01.

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[1] CWCI is a domestic and international common carrier providing IMTS between the United States and 161 international points.

[2] The Commission has concluded that the public interest in cost-based international telecommunications services would be served by the encouragement of international resale, provided that steps were taken to ensure that such resale did not exacerbate the settlements deficit. The Commission, therefore, conditioned its resale policy by requiring U.S. carriers to permit resale of their international private lines only to those countries which afford equivalent resale opportunities. (*See Regulation of International Accounting Rates, CC Docket 90-337, Phase II First Report and Order,* 7 FCC Rcd 559 (1992)). Subsequently, the Commission stated that the resale of international private lines for the provision of international private line services, as opposed to switched services, does not implicate the settlements process to the extent such lines are used only to carry non-switched traffic that is not subject to the international settlements process, and thus clarified that the equivalency requirement does not apply to the resale of international private lines for private line services. Nonetheless, the Commission confirmed the right of an end user to interconnect its international private line to the PSN through, for example, its own PBX. (*See Regulation of International Accounting Rates, CC Docket 90-337, Phase II Order on Reconsideration and Third Further Notice of Proposed Rulemaking* (Phase II Third Further Notice), 7 FCC Rcd 7927 (1992).)

[3] *See* Appendix A for list of authorized international points, derived from February 25, 1993 Amendment to Application. We note that should CWCI obtain any interest in facilities beyond the authorized forty-two international points for the purpose of providing common carrier services, including private line service, between the U.S. and other international points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's *International Competitive Carrier Policies,* 102 FCC 2d 812 (1985), *recon. denied* 60 R.R. 2d 1435 (1986), it would be necessary for CWCI to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

[4] Initially, CWCI intends to resell the services of Overseas Telecommunications, Inc. (OTI), IDB International (IDB), World Communications, Inc. (Worldcom) and TRT/FTC Communications, Inc. (TRT/FTC). *See* Application and amendments.

[5] *See Competition in the Interstate Interexchange Marketplace,* 6 FCC Rcd 5880, 5902 (1991)(*Interexchange Order*). *See also Cable and Wireless Communications, Inc.,* 7 FCC Rcd 6653 (1992).

8. IT IS FURTHER ORDERED that CWCI shall file a copy of any operating agreements entered into with foreign correspondents with the Commission within 30 days of their execution.

9. IT IS FURTHER ORDERED that CWCI shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services between the United States and the herein authorized international points within 90 days from the end of each calendar quarter.

10. IT IS FURTHER ORDERED that this Order may be subject to future modification pursuant to the outcome of the *Phase II Third Further Notice* and any related proceedings.

11. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services CWCI seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

12. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this Order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Appendix A

	Circuit 56/64 Kbps	Circuit T-1
Antigua	2	
Argentina	6	
Australia		2
Austria		3
Belgium		2
Bermuda	2	
Brazil	3	
Chile	5	
Columbia	5	
Denmark		1
Dominican Republic	1	
Finland	1	
France		3
Germany		3
Greece		1
Hong Kong		1
Hungary	12	
Ireland	2	
Israel	2	
Italy		3
Jamaica	4	
Japan	3	1
Luxemburg	3	
Malaysia	12	
Mexico	5	
Netherlands		3
New Zealand	6	
Norway		3
Philippines		1
Poland	12	
Portugal		2
Romania	12	
Singapore	12	
South Korea		3
Former Soviet Republics		1
Spain		3
Sweden		3
Switzerland		3
Taiwan		1
Turkey	12	
United Kingdom		3
Former Yugoslav Republics	5	

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

IDB COMMUNICATIONS GROUP, INC. File No. I-T-C-93-017

For Authority Pursuant to Section 214 of the Communications Act of 1934 to Establish and Operate Channels of Communication Between the United States and the Columbia TDRS Satellite System for the Provision of International. Communications

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: February 26, 1993; Released: March 8, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed by IDB Communications Group, Inc., (IDB), pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international video, program audio and private line services by IDB.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-017 IS GRANTED, and IDB is authorized to establish three (3) 36-MHz video channels, four (4) T-1 (1.544 Mbps) private line channels, and twenty (20) 64-kbps program audio channels of communication between appropriately licensed earth stations in the U.S. and each of the TDRS satellites, TDRS-41 and TDRS-174, for the provision of international full-time video and occasional video services, private line services not interconnected with the public switched network, and program audio services between the U.S. and currently authorized points of communications listed in Appendix A as well as those points which the Commission may authorize in the future to be served by the TDRS-41 and TDRS-174 satellites.

3. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61 for the services authorized in this order.

4. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

5. IT IS FURTHER ORDERED that IDB shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services between the United States and all international points it is authorized to serve within 90 days from the end of each calendar quarter.

6. IT IS FURTHER ORDERED that the applicant shall file separate Section 214 applications to establish any additional circuits over the TDRS satellite system.

7. IT IS FURTHER ORDERED that neither the applicant nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which the applicant or any persons or companies controlling it or controlled by it are parties.

8. IT IS FURTHER ORDERED that the authority granted herein for the applicant to establish channels of communication between the earth stations in the U.S. and the TDRS satellites does not dispense with the requirement that all such earth stations shall be authorized under Title III of the Communications Act of 1934, as amended, to communicate with those satellites for the provision of the service(s) authorized herein.

9. IT IS FURTHER ORDERED that any authorization of the applicant to provide private lines is limited to the provision of such private lines only between the United States and the countries listed in Appendix A -- that is, private lines which originate in the United States and terminate in the countries listed in Appendix A or which originate in one of the countries listed in Appendix A and terminate in the United States. In addition, the applicant may not -- and the applicant's tariff must state that the applicant's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched services, unless authorized to do so by the Commission upon a finding that the foreign administrations afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates,* Phase II, First Report and Order, 7 FCC Rcd 559 (1991), and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992).

10. This authorization is not to be construed as permitting the provision of any services between earth stations located within the U.S.

11. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between the applicant and its correspondent in each of the countries to which it is authorized to provide service, and the applicant shall file copies of the agreement with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51, and in *Regulation of International Accounting Rates,* Phase II, First Report and Order, 57 Fed. Reg. 646 (1992) (to be codified at 47 C.F.R. §43.51(a)(3)).

12. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX A

TDRS-41	TDRS-174
Austria	Hong Kong
Bahamas	Mexico
Belgium	Philippines
Canada	
France	
Germany	
Ireland	
Israel	
Jamaica	
Luxembourg	
Mexico	
Netherlands	
Portugal	
Sweden	
Switzerland	
United Kingdom	

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Mid Atlantic Telecom, Inc. File No. I-T-C-93-056-TC

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, for transfer of control of authorization to resell international switched voice services

MEMORANDUM, OPINION AND ORDER

Adopted: March 2, 1993; Released: March 8, 1993

By the Chief, International Facilities Division:

1. On December 18, 1992, Mid Atlantic Telecom, Inc. (Mid Atlantic) and Rochester Telephone Corporation (RTC) filed the above-captioned application pursuant to Section 214 of the Communications Act of 1934, as amended, and Section 63.01 of the Commission's Rules requesting authority to transfer control of Mid Atlantic and its Section 214 authorization to RTC. The application was put on public notice on December 23, 1992, and no comments were received.

2. Mid Atlantic is a privately held Virginia corporation. It has authority to provide international message telecommunications service (IMTS) by reselling switched voice services of various facilities based carriers.[1] It provides international service under the regulatory requirements established for non-dominant international carriers in *International Competitive Carrier Policies*.[2] Mid Atlantic also provides nationwide domestic interstate long distance telecommunications service by reselling the domestic long distance service of other common carriers pursuant to the Commission's domestic competitive carrier policies.[3] In addition, Mid Atlantic provides intrastate service in several states either pursuant to certification, registration, or tariff requirements, or on an unregulated basis.

3. RTC is a publicly held New York corporation and is the parent company of a number of local telephone companies and long distance carrier subsidiaries operating in multiple states. Several of RTC's long distance subsidiaries individually hold authority to operate as non-dominant international resale carriers. See Attachment. They also originate interstate traffic and provide intrastate service in several states pursuant to certification, registration, or tariff requirements, or on an unregulated basis. RTC claims to have annual revenues exceeding $700 million.

4. The application states that under the proposed transaction, RTC will acquire all of the common stock of Mid Atlantic in exchange for shares of RTC stock. Mid Atlantic will then be merged with Rochester Subsidiary Twenty-Five Inc. (a new Virginia subsidiary of RTC) with Mid Atlantic as the surviving entity. Through a series of inter-subsidiary stock contributions, Mid Atlantic will become a wholly owned subsidiary of Rochester Tel Telecommunications Corporation, which is a wholly owned subsidiary of Rochester Tel Telecommunications Holding Corporation, which is a wholly owned subsidiary of RTC. The application further maintains that Mid Atlantic will continue to provide high quality affordable international services pursuant to its tariff currently on file at the Commission. The transaction should be virtually transparent to Mid Atlantic's customers. Accounting will continue to be performed in accordance with generally accepted accounting principles and any applicable FCC accounting regulations. Applicants state that the transaction will benefit the public interest because it will permit RTC and Mid Atlantic to realize significant economic and marketing efficiencies which will enhance the ability of Mid Atlantic to continue providing high quality, low cost telecommunications services and to compete more effectively in the international switched voice service marketplace.

5. In view of the foregoing, we conclude that the transfer of control of Mid Atlantic and its Section 214 authorization to RTC will not adversely affect the public interest.

6. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01, that the application of Mid Atlantic Telecom, Inc. and Rochester Telephone Corporation, File No. I-T-C-93-056-TC, IS GRANTED and we consent to the transfer of control of Mid Atlantic and its Section 214 authorization originally granted in File No. I-T-C-88-183 (*see* n.1) to RTC.

7. IT IS FURTHER ORDERED, pursuant to Section 203 of the Communications Act, as amended, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, that Mid Atlantic must continue to maintain tariffs for the services authorized in this order.

8. IT IS FURTHER ORDERED that Mid Atlantic must file annual reports of overseas telecommunications traffic as required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

9. IT IS FURTHER ORDERED that Mid Atlantic is limited, under this order, to the provision of international switched voice services by the resale of the international switched voice services set forth in AT&T Tariff FCC Nos. 1 and 2, and FTCC Tariff FCC No. 23 between the U.S. and the international points listed in those tariffs in accordance with Mid Atlantic's previous authorization (*see* n.1).

10. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common

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[1] Mid Atlantic Telecom, Inc., File No. I-T-C-88-183, 3 FCC Rcd 6107 (1988).

[2] International Competitive Carrier Policies, 102 FCC 2d 812 (1985), *recon. denied*, 60 RR 2d 1435 (1986) (hereinafter *International Competitive Carrier Policies*).

[3] Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services and Facilities Authorizations Therefor, First Report and Order, 85 FCC 2d 1 (1980); Second Report and Order, 91 FCC 2d 59 (1982); *recon.*, 93 FCC 2d 54 (1983).

carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

11. This order is issued under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.115, may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2), 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

ATTACHMENT

RCI Long Distance, Inc., File No. I-T-C-91-076, letter to Timothy E. Welch from Chief, International Facilities Division, April 8, 1991.

Taconic Long Distance Service Corp., File No. I-T-C-91-027, 6 FCC Rcd 1744 (1991); File No. I-T-C-91-137-TC, 6 FCC Rcd 4418 (1991).

RCI Long Distance New England, Inc., File No. I-T-C-91-028, 6 FCC Rcd 1744 (1991).

Visions Long Distance America Inc., File No. I-T-C-92-262, 7 FCC Rcd 8109 (1992).

Visions Long Distance New York Inc., File No. I-T-C-92-263, 7 FCC Rcd 8109 (1992).

RCI Long Distance, Inc., File No. I-T-C-91-077, filed March 6, 1992, pending.

Before the
Federal Communications Commission
Washington, D.C. 20554

PageMart, Inc. File No. MSD-92-8

For a Delcaratory Ruling Concerning
Section 310(b)(4) of the Communications
Act of 1934

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 1993; Released: March 8, 1993

By the Chief, Mobile Services Division:

1. PageMart, Inc. (PageMart) requests a declaratory ruling that the appointment of T. Geir Ramleth, a Norwegian citizen, to the corporate office of Vice President and Chief Financial Officer will not adversely affect the public interest.

2. PageMart has one radio common carrier license held by an independent subsidiary, PageMart II, licensee of Station KNKO387, in Sacramento, California, in the public mobile service.

3. Section 310(b)(4) of the Communications Act of 1934, provides that common carrier radio licenses shall not be granted to or held by:

> any corporation directly or indirectly controlled by any other corporation of which any officer [is an] alien ... if the Commission finds that the public interest will be served by the refusal or revocation of such license.

4. The benchmarks established in Section 310(b)(4) apply to entities such as PageMart which directly or indirectly control licenses. The restrictions in Section 310(b)(4) reflect national security concerns and are designed to guard against undue foreign influence by limiting aliens' participation in certain domestic radio activities.[1] Nevertheless, it is within the Commission's discretion to allow a foreign national to serve as an officer of a parent corporation if such an appointment will not adversely affect the public interest.[2]

5. PageMart states that it wishes to appoint Mr. Ramleth to the position of Vice President and Chief Financial officer because of his excellent professional credentials and his thorough knowledge of, and experience with, the financing and operation of paging companies. Mr. Ramleth will principally be responsible for assisting in the development of PageMart's nationwide private radio network. Mr. Ramleth's responsibilities will include providing financial methodologies for enhancing and expanding the PageMart operation.

6. PageMart submits that the desired appointment of Mr. Ramleth as its Vice President and Chief Financial Officer would not in any way threaten United States security interests or otherwise disserve the public interest. We agree. Mr. Ramleth will not serve as an officer or director of PageMart II, Inc., or any subsidiaries and will not control any subsidiary's radio licenses or facilities. Mr. Ramleth will be the only corporate officer who is not a United States citizen.

7. Accordingly, IT IS ORDERED that the request for declaratory ruling filed by PageMart, Inc., in the captioned proceeding IS GRANTED and the Mobile Services Division would have no legal objection under Section 310(b)(4) of the Communications Act of 1934 to the appointment of T. Geir Ramleth, a Norwegian citizen, as a corporate officer of PageMart, Inc.

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

[1] *See Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310 (b)(3) and (4) of the Communications Act of 1934, as amended* (Wilner & Scheiner), 103 FCC 2d 511, 516-17 (1985), *recon.*, 1 FCC Rcd 12 (1986).

[2] *See International Telephone and Telegraph Corp.*, 67 FCC 2d 604 (1978); *Contel Corporation*, 3 FCC Rcd 5795 (Dom. Fac. Div. 1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-30

In the Matter of

Amendment of Part 80 of the Rules to Add the San Francisco Port Area to the List of U.S. Coast Guard Vessel Traffic Service (VTS) Systems and Designate Marine VHF Channel 14 as the San Francisco Port Area VTS Frequency — RM-7603

REPORT AND ORDER

Adopted: February 26, 1993; Released: March 9, 1993

By the Commission:

I. INTRODUCTION

1. This *Report and Order* adopts changes to Part 80 of the Commission's Rules, 47 C.F.R. Part 80, to add the San Francisco, California port area to the United States Coast Guard (Coast Guard) designated radio protection areas for mandatory Vessel Traffic Services (VTS) and to establish marine VHF channel 14 (156.700 MHz) as the VTS frequency for the San Francisco port area.

II. BACKGROUND

2. A VTS system is used as an advisory service to coordinate vessel movement and prevent collisions in large, busy port areas. Vessels report information related to position, course, speed, and conditions affecting their ability to navigate to the Coast Guard, which then tracks the movement of these vessels. VTS systems use VHF marine radiotelephone equipment to exchange voice communications on channels dedicated to VTS operations in Coast Guard designated VTS areas.

3. The Commission amended its Rules in 1975, at the Coast Guard's request, to make frequencies available in certain designated areas exclusively for VTS communications.[1] Frequencies allotted for VTS communications are available for assignment outside of VTS designated areas on a noninterference basis.[2] Currently, Section 80.383 of the Commission's Rules, 47 C.F.R. § 80.383, lists four geographic areas - Seattle, New York, New Orleans and Houston - as Coast Guard designated VTS areas.

4. In response to a request from the Coast Guard,[3] we proposed in the *Notice of Proposed Rule Making* (*Notice)* to add the port of San Francisco to the Commission's list of Coast Guard designated radio protection areas and to allot marine VHF channel 14 exclusively for VTS communications in the port of San Francisco.[4] There were no comments filed in response to the *Notice*.

III. DISCUSSION

5. As a result of the Oil Pollution Act of 1990,[5] the Coast Guard has proposed rules that, if adopted, will require certain vessels to participate in a VTS system in the port of San Francisco. The San Francisco VTS system is part of a Coast Guard program designed to protect the marine environment by preventing vessel collisions and groundings. Designating San Francisco as a VTS area will allow the Coast Guard to manage vessel traffic in that area more efficiently. We are adding, therefore, San Francisco to the Commission's list of designated radio protection areas for VTS systems specified in Section 80.383 of the Rules. For the purposes of Part 80, the San Francisco port area is defined as a rectangle bounded by the coordinates 39 degrees on the north, 37 degrees on the south, 123 degrees 20 minutes on the west and 120 degrees 50 minutes on the east.

6. We are designating marine VHF channel 14 exclusively for VTS operations within the specified geographic area.[6] This channel is already allotted for VTS communications in other ports. Additionally, we are permitting private coast stations currently authorized to operate on channel 14 within the VTS area to continue operation until the end of their current license terms.[7] Further, the staff will work with affected licensees to find suitable alternative channels.[8]

7. In addition, we are also adopting minor editorial clarifications, unrelated to VTS operations, to Part 80 of the rules. First, Mr. J.M. McCord noted that currently the Commission's Rules do not appear to authorize ship-to-ship Narrow Band Direct Printing (NB-DP) communications.[9] This omission in Part 80 appears to have been inadvertent. Prior to the *Report and Order,* in PR Docket No. 85-145, 51 Fed. Reg. 31206 (1986), which reorganized and revised Parts 81 and 83 of the rules into a new Part 80 governing the maritime radio services, Part 83 authorized NB-DP communications on certain non-paired frequencies for business and operational traffic between ship stations or coast stations.[10] That *Report and Order,* however, was not intended to make any substantive changes to the maritime rules governing NB-DP. *See Report and Order* at paragraph

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[1] *See Report and Order,* PR Docket No. 20444, 56 FCC 2d 1089 (1975).

[2] *See e.g.,* 47 C.F.R. § 80.373(f) n.3.

[3] *See* letter to Chief, Aviation and Marine Branch, Special Services Division, Private Radio Bureau, Federal Communications Commission, Washington, D.C. from Commandant, United States Coast Guard (January 8, 1991).

[4] *See Notice of Proposed Rule Making,* 7 FCC Rcd 1776 (1992).

[5] Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484.

[6] *Notice of Proposed Rule Making,* CGD 90-020, 56 Fed. Reg. 36910 (1990).

[7] There are currently two licensed private coast stations that would be affected by this rule change.

[8] Although this change will require some licensees within the VTS area to switch to an alternative channel, we do not believe there will be a significant adverse impact.

[9] *See* letter to Chief, Aviation and Marine Branch, Special Services Division, Private Radio Bureau, Federal Communications Commission, Washington, D.C. from Mr. J.M. McCord (February 14, 1992).

[10] *See* 47 C.F.R. § 83.330 (1985).

21. Therefore, we are amending Section 80.361 of the Commission's Rules, 47 C.F.R. § 80.361, to clarify that ship-to-ship NB-DP is authorized.

8. Second, the Coast Guard has requested that we clarify the Channel 16 (156.800 MHz) watch requirement contained in Part 80. The Coast Guard notes that certain vessels required by Coast Guard regulation to carry radio equipment, such as fishing vessels, should be required to monitor channel 16 while the vessel is underway.[11] Section 80.148 of the Commission's Rules, for example, requires all compulsory VHF ship stations to maintain a watch on Channel 16 "during its hours of service." The Coast Guard believes that this requirement would be clearer if it were amended to read that compulsory vessels must maintain a watch "while underway." We agree. Therefore, we are adopting this minor editorial change to clarify the watch requirements contained in Section 80.148. We are also streamlining the text of this rule to improve its clarity and adding the term "underway" to the list of definitions in Section 80.5. Finally, we are adopting a nonsubstantive correction to a footnote listed in Section 80.373(f) of the Commission's Rules, 47 C.F.R. 80.373(f).

9. Because the editorial rule amendments adopted herein are minor and noncontroversial in nature, we find that there is good cause to not comply with the notice and comment provisions the Administrative Procedure Act. *See* 5 U.S.C. § 553(b)(B).

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), Part 80 of the Commission's Rules IS AMENDED as set forth in the Appendix below, effective thirty days after publication in the Federal Register.

11. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

12. For further information, contact Marc S. Martin, Private Radio Bureau, Aviation and Marine Branch, (202) 632-7175.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Final Rule

Part 80 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

A. Part 80 - STATIONS IN THE MARITIME SERVICES.

1. The authority citation for part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

2. In Section 80.5, a new definition, to appear in alphabetical order, is added to read as follows:

§ 80.5 Definitions.

* * * * *

Underway. A vessel is underway when it is not at anchor, made fast to the shore or aground.

* * * * * *

3. Section 80.148 is amended by revising the introductory paragraph to read as follows:

§ 80.148 Watch on 156.8 MHz (Channel 16).

At least one VHF ship station per compulsory vessel while underway must maintain a watch on 156.800 MHz whenever such station is not being used for exchanging communications. The watch is not required:

* * * * * *

4. Section 80.361 is amended by revising paragraph (b) to read as follows:

§ 80.361 Frequencies for narrow-band direct-printing (NB-DP) and data transmissions.

(a) * * *

(b) The following table describes the frequencies and Channel Series with F1B or J2B emission which are assignable to ship stations for NB-DP and data transmissions with other ship stations and public coast stations. Public coast stations may receive only on these frequencies. * * * *

* * * * * *

[11] *See* letter to Chief, Aviation and Marine Branch, Special Services Division, Private Radio Bureau, Federal Communications Commission, Washington, D.C., from Chief, Frequency Assignment Staff, U.S. Coast Guard, Washington, D.C. (July 23, 1992).

5. In Section 80.373(f), the second Footnote 14 is redesignated as Footnote 15, to read as follows:

§ 80.373(f) Private communication frequencies.

(f) * * *

14 Available only in the Puget Sound and the Strait of Juan de Fuca.

15 The frequency 156.525 MHz is to be used exclusively for distress, safety and calling using digital selective calling techniques. No other uses are permitted.

* * * * * *

6. Section 80.383 is amended by revising the table in paragraph (a) to add San Francisco to the list of geographic areas for the carrier frequency 156.700 MHz, by adding a Footnote 2 below the table in paragraph (a), by revising paragraphs (b)(3) and (b)(4), and by adding new paragraph (b)(5), to read as follows:

§ 80.383 Vessel Traffic Services (VTS) system frequencies.

* * *

(a) Assigned frequencies:

VESSEL TRAFFIC CONTROL FREQUENCIES

Carrier frequencies (MHz)	Geographic areas
* * *	
156.700	New York, New Orleans[1], Seattle, San Francisco[2]

[1] * * * *

[2] Private coast station licenses for the use of this frequency will not be renewed beyond November 1, 1997. Continued use until expiration must be on a noninterference basis to Coast Guard VTS communications.

(b) * * *

(3) *Houston.* The rectangle between north latitudes 28 degrees 30 minutes and 30 degrees 20 minutes and west longitudes 93 degrees 30 minutes and 96 degrees;

(4) *Seattle (Puget Sound).* The area encompassed between the United States-Canadian border and a line drawn from 49 degrees North 121 degrees West on the United States-Canadian Border, to 46 degrees 30 minutes North 121 degrees West, then to 46 degrees 30 minutes North 125 degrees West, then to 48 degrees 30 minutes North 125 degrees West, and then east to the United States-Canadian Border; and

(5) *San Francisco.* The rectangle between north latitudes 39 degrees and 37 degrees and west longitudes 120 degrees 50 minutes and 123 degrees 20 minutes.

* * * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-504

In re Applications of

ANCHOR BROADCASTING LIMITED PARTNERSHIP	File No. BPH-860917MD
GALAXY COMMUNICATIONS, INC.	File No. BPH-860918NY
SUSAN M. BECHTEL	File No. BPH-860918OV

For a Construction Permit for a new FM Station on Channel 250A in Selbyville, Delaware

MEMORANDUM OPINION AND ORDER

Adopted: F ruary 24, 1993; Released: March 10, 1993

By the Commission:

1. In this order, we modify our memorandum opinion and order in *Anchor Broadcasting Limited Partnership*, 7 FCC Rcd 4566 (1992).[1] That action reaffirmed the grant of Anchor Broadcasting Limited Partnership's application for a new FM radio station in Selbyville, Delaware, and the denial of competing applications by Galaxy Communications, Inc. and Susan M. Bechtel. 7 FCC Rcd at 4569 ¶ 23.

I. BACKGROUND

2. The Commission originally granted Anchor's application in *Anchor Broadcasting Limited Partnership*, 6 FCC Rcd 721 (1991). We preferred Anchor and Galaxy over Bechtel because, unlike Bechtel, they proposed to integrate their ownership into management. We preferred Anchor over Galaxy because Anchor's integration was enhanced by minority ownership and proposed local residence. We found these advantages more significant than Galaxy's very brief local residence and civic participation and Galaxy's slight preference for comparative coverage. The United States Court of Appeals for the District of Columbia Circuit remanded the proceeding to the Commission to further consider Bechtel's argument that integration should no longer be used as a comparative criterion. *Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992), *cert. denied sub nom. Galaxy Communications, Inc. v. FCC*, 113 S.Ct. 57 (1992).[2]

3. After remand, the Commission reviewed Bechtel's argument that changed circumstances had "eviscerated" the validity of the integration criterion.[3] We concluded that the changed circumstances cited by Bechtel did not vitiate the integration criterion, as Bechtel claimed.[4] 7 FCC Rcd at 4567-68 ¶ ¶ 12-17.

4. We also noted that we had undertaken a rulemaking that would reexamine, based on a comprehensive consideration of the public policy factors raised, whether the integration criteria should be retained, eliminated, or modified. *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd 2664 (1992). We concluded that the pendency of this rulemaking did not warrant holding this or other pending cases in abeyance.

5. We found that the mere possibility that the rulemaking might result in the modification of the integration criterion did not justify delaying service to the public by holding cases in abeyance. 7 FCC Rcd at 4568 ¶ 19. Moreover, in view of applicants' reliance on existing policy, we did not anticipate that the results of the rulemaking would be applied to pending hearing cases in any event. *Id.* at 4568 ¶ ¶ 20-22.

II. PETITION FOR RECONSIDERATION

6. Galaxy argues that the Commission should hold this proceeding in abeyance pending the outcome of the rulemaking. Galaxy contends that the possibility of delay is not a valid reason to uphold the grant of Anchor's application and notes that Anchor has not yet commenced operation despite the fact that it has a (not yet final) construction permit.[5] Galaxy further contends that Anchor's litigation expenses in reliance on existing policy are no basis to avoid applying a new integration policy to Anchor. According to Galaxy, the Court of Appeals required the Commission to demonstrate affirmatively the validity of the integration criterion and not merely to examine the changed circumstances cited by Bechtel as undermining integration. Galaxy adds, however, that it could, if given the chance, provide evidence that integra-

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[1] The Commission has before it: (1) a Petition for Reconsideration, filed August 20, 1992, by Galaxy Communications, Inc.; an opposition, filed September 2, 1992, by Anchor Broadcasting Limited Partnership; and a reply, filed September 15, 1992, by Galaxy; and (2) a Motion (and motion for leave to file) by Susan M. Bechtel for Summary Dismissal of Petition for Reconsideration, filed January 5, 1993; an opposition, filed January 22, 1993, by Galaxy; and a reply, filed February 3, 1993 by Bechtel.

[2] Galaxy sought certiorari on the grounds that the credit Anchor received for minority ownership was unconstitutional.

[3] Before making our ruling, we invited the parties to submit comments "as to what further action should be taken in light of the court's remand." *Anchor Broadcasting Limited Partnership*, FCC 91I-015 (Mar. 16, 1992). Because the issues had already been argued before the Commission and the court, we did not find a need for a more elaborate briefing of the issues. Nonetheless, to the extent that the parties wished to proffer arguments on the merits or additional relevant evidence, the comments gave them the opportunity to do so.

[4] Bechtel argued that the *Anax* doctrine, which disregards the interests of passive owners in the comparative analysis, and the repeal of the three-year restriction on the sale of broadcast stations have undermined the integration criterion. According to Bechtel, these circumstances allow applicants, actually controlled by investors who would not be integrated into management, to claim full integration credit and then quickly sell their stations to absentee owners.

[5] Anchor responds that it has made substantial progress towards constructing the station since receiving a construction permit on June 7, 1991. Opposition at 5.

tion has "some validity." Petition for Reconsideration at 4. Galaxy also faults the Commission for not also considering Galaxy's further argument that it should prevail over Anchor based on its advantage for comparative coverage.

7. Bechtel contends that Galaxy's petition for reconsideration should be dismissed on the grounds that Galaxy no longer has an interest in this proceeding. *See* 47 C.F.R. § 1.106(b)(1). Bechtel observes that the Supreme Court denied certiorari as to Galaxy's appeal challenging the constitutionality of Anchor's minority preference. According to Bechtel, the Supreme Court's action terminates Galaxy's appeal and makes the denial of Galaxy's application final. Bechtel asserts that the Court of Appeals gave no indication that Galaxy's application should be considered in the remanded proceeding.

8. Galaxy responds that it continues to have an interest in this proceeding because it may prevail if the Commission reexamines the comparative criteria. Galaxy admits that it "can no longer prevail as a direct result of the arguments it made to the United States Supreme Court." Opposition at 5. Nonetheless, Galaxy argues that the "proper treatment of the comparative criteria" would result in a determination that Galaxy's proposal would best serve the public interest. *Id.* Galaxy notes that in responding to Galaxy's petition for certiorari the Commission argued that minority preferences might not be dispositive in this case because an applicant "other than Anchor" might prevail in this remanded proceeding. Brief for the United States and the Federal Communications Commission in Opposition, No. 91-1744 at 14.[6] Galaxy maintains that this statement implies that either Bechtel or Galaxy might prevail.

9. On February 19, 1993, the Court of Appeals denied a motion by Bechtel to dismiss Galaxy as a party to this case. *Bechtel v. FCC*, No. 92-1378 (D.C. Cir. Feb. 19, 1993). The court held that Galaxy's interests may be affected by future court action in this proceeding. In deference to this ruling, we will consider Galaxy's petition on its merits. We note, however, that Galaxy's efforts to supplant Anchor as the winner in this case appear to depend crucially on its challenge to Anchor's decisive advantage for minority ownership. We have stated that even if we were to modify or eliminate the integration criterion -- either in this case or in the pending rulemaking -- we would not reduce the weight due Anchor's minority ownership. *See Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd at 2667 ¶ 23.

III. THE *FLAGSTAFF* OPINION

10. After Galaxy filed its petition for reconsideration here, the United States Court of Appeals for the District of Columbia Circuit issued a decision in the Flagstaff, Arizona comparative proceeding. *Flagstaff Broadcasting Foundation*, No. 90-1587 (D.C. Cir. 1992). Although the Commission's actions in this proceeding were not technically before the *Flagstaff* court, the court noted the similarity of the issues raised in the two cases, and extensively referred to and relied on its ruling in this proceeding in deciding *Flagstaff*.

11. In so doing, the *Flagstaff* court criticized the memorandum opinion and order now before us. The court faulted the Commission for failing to give reasons for continuing to apply the integration policy and for refusing to consider alternatives to integration. The court stated that Bechtel "received no more than a summary dismissal of her claims after a cursory review of the history of the integration criterion." *Flagstaff*, Slip Op. at 10. The court admonished the Commission to respond to the contention that Bechtel's proposal would further the objectives of the integration criterion better than her competitors'. *Id.*

IV. DISCUSSION

12. It is evident from the *Flagstaff* opinion that we did not appreciate the full extent of the court's concerns about the integration policy. Accordingly, we take this opportunity to present a more comprehensive discussion of our views concerning integration. We will address three topics: (1) the reasons that we give credit to applicants proposing integration; (2) the reasons that we do not give credit to applicants (such as Bechtel) proposing "functional equivalents" of integration; and (3) the impact on pending cases of any future Commission action to modify the integration policy.

13. Throughout the history of the comparative hearing process -- indeed, long before the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) -- the Commission has examined the extent to which applicants proposed to integrate their ownership into management. The Commission has taken integration, and related factors, into account as a means of predicting which applicant will more likely be aware of and responsive to the needs of the community and to fulfill those needs on a continuing basis. *See Oregon Television, Inc.*, 9 RR 1401, 1449 ¶ 12 (1952). The Commission has also sought to predict which applicant would more likely effectuate its proposals and policies. *See Madison County Broadcasters*, 30 FCC 694, 697 ¶ 7 (1961).

14. Our action in this regard reflects our "broad discretion in determining . . . what policies should be pursued in promoting [a public interest goal]. *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 600 (1981).[7] In keeping with this principle, the Commission may make determinations "rooted in its experience" as to whether particular public interest determinations are "administratively tenable." *Id.* at 599-601.[8] Moreover, the Commission may make determinations that are primarily of a judgmental or predictive nature (such as whether licensees are likely to serve the

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[6] Galaxy opposed the Commission's suggestion that the constitutionality of the minority preference might not be ripe for review. Petitioner's Brief in Reply to Brief in Opposition to the Petition for Certiorari, No. 91-1744 at 5 n.1. In accordance with its usual practice, the Supreme Court did not specify any reason for denying certiorari and that action does not represent an opinion by the court on the merits of the case. *See Brown v. Allen*, 344 U.S. 443, 491-92 (1953). Thus, we can draw no inferences from the fact that the court denied certiorari as to the question of ripeness or other issues raised before the court. *See Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 365-66 n.1 (1973).

[7] "[T]he weighing of policies under the public interest standard is a task that has been delegated to the Commission in the first instance." *WNCN*, 450 U.S. at 596.

[8] In *WNCN*, the Commission adopted its policy statement (declining to make administrative evaluations of proposed broadcast entertainment format changes), after notice and comment, pursuant to its informal rulemaking authority and in reliance on a staff study, in addition to its "experience". 450

public interest), since, under such circumstances, complete factual support for the Commission's conclusions is neither possible nor required. Thus, "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency." *See FCC v. National Citizens Committee for Broadcasting,* 436 U.S. 775, 813-14 (1978) (the Commission "grandfathered" existing newspaper-broadcast combinations except for 16 "egregious cases"). *See also FCC v. WNCN Listeners Guild,* 450 U.S. at 594-95. We believe that our use of the integration criterion for resolution of pending comparative cases is a reasonable and appropriate exercise of our broad discretion, to which courts have given substantial deference. *WNCN,* 450 U.S. at 596.

15. The basis of our predictive judgment regarding integration has rested on three characteristics of an integrated applicant. First, the owners of an applicant proposing integration have demonstrated an active interest in the operation of the station that nonintegrated owners have not demonstrated. *See Pilgrim Broadcasting Co.,* 14 FCC 1308, 1349 ¶ 15 (1950).[9] Second, integrated owners, by virtue of their presence at the station, necessarily have been in a better position than absentee owners to become aware of specific requests, for example, from station visitors and correspondence, that the station's programming address community needs, and of the possibility that the station is not in compliance with Commission rules and policies. Third, integration has permitted those individuals with the most authority over, most direct financial interest in, and greatest legal accountability for the station to exercise day-to-day control and discretionary judgment at the station. *See Homer Rodeheaver,* 12 FCC 301, 307-08 ¶ 3 (1947). Such direct participation has given greater assurance that the station will effectively implement responsive programming and better ensures compliance with Commission rules and policies. Integration thus has reduced the risks that arise when an owner delegates responsibility for these matters to employees, who do not have the same authority and incentives. We recognize that nonintegrated applicants may claim to meet the objectives of the integration policy through other forms of management. As explained above, however, such proposals do not afford benefits equivalent to integration.

16. As the preceding paragraph indicates, integration provides structural, and therefore more objective, assurances that the licensee will serve the public interest. Proposed functional alternatives to integration like that proposed by Bechtel require the Commission to evaluate the applicant's subjective intentions and the efficacy of its proposed management. This type of *ad hoc* assessment is inherently less certain than consistent reliance on an objective structural factor such as integration.[10] We have examined applicants' integration from the early days of the comparative hearing process, when hearings involved a relatively detailed and searching inquiry into the applicants' proposals. In adopting the 1965 *Policy Statement* with its emphasis on integration, we sought to simplify the decisional process in comparison with former practices and thereby to introduce more "consistency of decision and of clarity in our basic policies" and to prevent undue delay in the disposition of cases. *Policy Statement,* 1 FCC 2d at 393. Indeed, in *Central Florida Enterprises, Inc. v. FCC,* 598 F.2d 37, 56 (D.C. Cir. 1978), the court criticized the Commission for employing an *ad hoc* functional analysis of the criteria in the 1965 *Policy Statement* without providing "an alternative scheme affording a thorough and intelligible comparison." Now, as then, and until some valid alternative system is developed, the criteria of the 1965 *Policy Statement,* including integration, provide the only available system for making a consistent, thorough, and intelligible comparison.

17. Although the foregoing discussion reflects the basis for our reliance on the integration criterion in this and other pending cases, we recognize that the integration policy may be subject to modification.[11] In our pending rulemaking, we are examining whether changes in Commission policy, the realities of the broadcast industry, and the current state of broadcast technology warrant modification of the comparative criteria. We are also examining whether the current criteria have caused unwarranted delays in the resolution of comparative cases. *Reexamination of the Policy Statement on Comparative Broadcast Hearings,* 7 FCC Rcd 2664, 2665 ¶ 9 (1992). Integration is one of the factors we have proposed to reexamine. *Id.* at 2665-66 ¶ ¶ 14-15.

18. We may ultimately conclude that in the current broadcast environment we can fashion a better approach -- or modify the current approach -- for making judgments on how to select from among two or more qualified applicants. We have not yet, however, reached any such conclusion. Until we do, we will continue to apply the integration criterion as we have in the past. Moreover, even if we do reach such a conclusion, it is unlikely that we would apply such changes to pending cases. As we noted, we do not find it appropriate to prejudice applicants that incurred significant expenses litigating proposals that could potentially be rendered inferior by drastically new policy. Additionally, we wish to ensure that our policies serve the overall public interest by avoiding delay in initiating new service to the public. 7 FCC Rcd at 4568 ¶ ¶ 18-22.[12]

U.S. at 585, 591. However, the Supreme Court has also recognized that the Commission may validly develop policy through case-by-case evolution. *SEC v. Chenery Corp.,* 332 U.S. 194, 202-03 (1947). As noted above, the integration criterion was adopted as part of the case-by-case evolution of the comparative process culminating in the 1965 *Policy Statement.* Thus, the fact that the Commission did not use notice and comment procedures in developing its comparative criteria does not invalidate the use of integration as an appropriate exercise of the Commission's policymaking discretion.

[9] We note, however, that in *Pilgrim* the Commission gave weight to indications of active interest other than integration. As explained in paragraph 17, below, we no longer do so.

[10] In this regard, where an adequate rationale has been established, a general policy need not contain a "safety valve" procedure for waiver in particular cases. *See WNCN,* 450 U.S. at 601 n.44.

[11] Nonetheless, we adhere to our judgment, set forth in our prior memorandum opinion and order, that the factors relied on by Bechtel do not eviscerate the integration criterion.7 FCC Rcd at 4567-68 ¶ ¶ 12-17.

[12] In the wake of *Bechtel v. FCC,* arguments concerning the validity of the integration criterion are being made in several cases in addition to this case and *Flagstaff.* In addition to a number of cases before the Commission, there are nine cases, involving 50 applicants, now pending before the court of appeals. *Mazo Radio Co. v. FCC,* No. 92-1659 (D.C. Cir. Dec. 22, 1992); *Biltmore Forest Broadcasting FM, Inc. v. FCC,* No. 92-1645 (D.C. Cir. Dec. 15, 1992); *Lamprecht v. FCC,* No. 92-1586 (Nov. 12, 1992); *Golden Shores Broadcasting, Inc. v. FCC,* No. 92-1574

19. Because we have changed our view as to the scope of the court's remand order, we will grant reconsideration to the extent that Galaxy maintains that the court required further justification of the integration policy. We will otherwise deny reconsideration. In particular, Galaxy provides no basis for reconsidering our decision not to hold this case in abeyance pending the outcome of the rulemaking. As we have held: ". . . rehearing will not be granted merely for the purpose of again debating matters on which the tribunal has once deliberated and spoken." *WWIZ, Inc.*, 37 FCC 685, 686 ¶ 2 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

20. In exercising our discretion not to hold this proceeding in abeyance, we noted well-established precedent for taking into account prejudice to parties relying on existing policy. *See* 7 FCC Rcd at 4568 ¶ ¶ 21-22. Moreover, seeking to avoid delay in the initiation of new service to the public is clearly a factor pertinent to the public interest. *See, e.g., Proposals to Reform the Commission's Comparative Hearing Process*, 5 FCC Rcd 4050 ¶ 3 (1990).

V. ORDERS

21. ACCORDINGLY, IT IS ORDERED, That, good cause having been shown, the Motion for Leave to File "Motion by Susan M. Bechtel for Summary Dismissal of Petition for Reconsideration," filed January 5, 1993 IS GRANTED; the Motion of Susan M. Bechtel for Summary Dismissal of Petition for Reconsideration, filed January 5, 1993, IS DENIED; and the Petition for Reconsideration, filed August 20, 1992, by Galaxy Communications, Inc., IS GRANTED to the extent indicated herein and otherwise IS DENIED.

22. IT IS FURTHER ORDERED, That the Memorandum Opinion and Order of the Commission, FCC 92-300 (July 21, 1992) (7 FCC Rcd 4566) IS MODIFIED as set forth above.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

(D.C. Cir. Nov. 2, 1992) (and related case); *Playa del Sol Broadcasters v. FCC*, No. 92-1386 (D.C. Cir. Aug. 24, 1992); *Caldwell Broadcasting Limited Partnership v. FCC*, No. 92-1343 (D.C. Cir. Aug. 6, 1992); *Chase Communications, Inc. v. FCC*, No. 92-1078 (D.C. Cir. Feb. 20, 1992); *Evergreen Broadcasting Corporation II v. FCC*, No. 91-1511 (D.C. Cir. Oct. 18, 1991); *Kansas City TV 62 Limited Partnership v. FCC*, No. 91-1491 (D.C. Cir. Oct. 7, 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-502

In re applications of

Michelle Elaine Hulse, et al., d/b/a/ HULSE, HORN, METZGER & WOOKEY, G.P. — File No. BPH-890526MG

BEN L. UMBERGER — File No. BPH-890530MI

For Construction Permit for
New FM Station, Channel 228A,
Chandler, Indiana

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 1993; Released: March 10, 1993

By the Commission:

1. Ben L. Umberger has filed an application for review of the Review Board's decision in this case, 7 FCC Rcd 5090, which holds that the competing application of Hulse, Horn, Metzger and Wookey, G.P. (HHM), which proposes integration of 10 percent of its ownership, as enhanced by past and future local residence and broadcast experience, is superior to that of Umberger, which proposes no integration of ownership into management. HHM opposes the application for review.[1] We agree with the Board's disposition of this case. [2]

2. ACCORDINGLY, IT IS ORDERED pursuant to 47 C.F.R. § 1.115(g) that the application for review that Ben L. Umberger filed on September 10, 1992 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] Hulse filed the application for review on September 10, 1992. HHM filed the opposition on September 25.

[2] In conjunction with its attack on the reliability of HHM's integration proposal, Umberger refers to *Bechtel* v. *FCC*, 957 F.2d 873 (D.C. Cir. 1992). Umberger's passing reference to *Bechtel* provides no basis for overturning the Board's decision. Unlike *Bechtel*, Umberger has not argued that his non-integrated proposal would serve the public interest as well as, if not better than, if he proposed to be integrated. Rather, Umberger's challenge to HHM's request for integration credit consists solely of an argument that HHM's proposal was unreliable. The Board adequately responded to that challenge. 7 FCC Rcd at 5092 ¶ 17. See also *Anchor Broadcasting Limited Partnership*, FCC 93-115, adopted February 24, 1993.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 10, 1993

Report No. DS-1290

ADDITIONAL GUIDELINES FOR FILING MODIFICATION AND RENEWAL APPLICATIONS FOR DOMESTIC FIXED-SATELLITE EARTH STATIONS

This Public Notice is intended to provide applicants with further information that will increase the likelihood of filing acceptable applications to modify or renew licenses for domestic fixed-satellite earth stations. Incomplete and incorrect applications result in processing delays for applicants and increased work for the Satellite Radio Branch staff.

Operational and technical requirements for earth stations have changed during the last several years. For example, earth stations licensed after January 1, 1986, must meet a more stringent electromagnetic radiation standard than those stations licensed before that date. Renewal and modification applications afford us the opportunity to assess whether older stations are in compliance with new requirements. This Public Notice outlines several areas in which modification and renewal applications have often been incomplete or unacceptable and describes what information is needed in order for Branch staff to complete processing.

All applications for modification and renewal of earth stations must include the correct emission designator for the station as determined in accordance with Section 2.201-2 of the Commission's rules, 47 C.F.R. §2.201-2. Licensees wishing to renew a ten-year license will need to provide emission designators, in accordance with the above referenced section, rather than the designators used in the early 1980's. Changes can be entered on Item 6 of Form 405 or Item 16(c) of Form 493.

Applicants wishing to modify or renew an earth station license are encouraged to follow "Guidelines for Filing Domestic Satellite Earth Station Applications" Public Notice, Report No. DS-1231 released September 29, 1992. That Public Notice addresses radiation hazard certification and provides additional guidance for all earth station applications.

Fixed-earth stations are licensed according to the nearest one second of latitude and one second of longitude. This information is entered on Item 9 of Form 493. The entire FCC domestic satellite earth station data base of about 38,000 applications is organized according to this standard, which is an important consideration from a frequency coordination point of view. In some cases, licensees have added additional antennas to a station without regard to the one second standard. Licensees and applicants can contribute to better spectrum management in the frequency bands assigned to the fixed-satellite service by adhering to this requirement. The processing staff, on occasion, finds such earth stations and the situation must then be corrected. Usually, one or more new applications must be filed to accommodate multiple antenna facilities that do not meet the one second standard. Additional call signs are issued to satisfy the requirement.

Applicants are also encouraged to make certain that the information contained in the current filing reflects the actual makeup of the earth station. This relates to the actual number of antennas, size and model of antennas, information on transmitters (power amplifiers), radio frequencies used in operation, and other technical information.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-634

In re Applications of

AB Partners, Ltd.	File No. BPH-881215MI
BEBE-F Broadcasting Corp.	File No. BPH-881215NE
Baker Communications Partnership	File No. BPH-881215NN

For Construction Permit for
a new FM Station on Channel 297A
(107.3 MHz) in Baker, Louisiana

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 1993; Released: March 10, 1993

By the Commission:

1. In an Initial Decision, Administrative Law Judge Walter C. Miller granted the application of BEBE-F Broadcasting Corp. (BEBE) and denied the competing applications filed by AB Partners, Ltd. (AB) and by Baker Communications Partnership (Baker). *AB Partners, Ltd.*, 7 FCC Rcd 1572 (ALJ 1992). The Review Board affirmed the grant of BEBE's application based upon the qualitative superiority of its integration proposal without determining whether the ALJ had erred in totally discrediting the integration proposals of AB and Baker. *AB Partners, Ltd.*, 7 FCC Rcd 5160 (Rev. Bd. 1992). Baker has not filed an application for review, and the Board's denial of its application is therefore final.

2. Now before the Commission are an Application for Commission Review, filed on September 14, 1992, and an Errata thereto, filed on September 17, 1992, by AB Partners, Ltd., and an Opposition, filed on September 29, 1992, by BEBE-F Broadcasting Corporation. We agree with the Board's resolution of this case.

3. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. § 1.115(g) of the Commission's Rules, the Application for Commission Review, filed September 14, 1992, by AB Partners, Ltd. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

SOUTHWEST EDUCATIONAL MEDIA FOUNDATION OF TEXAS, INC. — File No. BPED-900629MJ

For Construction Permit for a New Noncommercial Educational FM Station on Channel 280A at Brownfield, Texas

MEMORANDUM OPINION AND ORDER

Adopted: March 1, 1993; Released: March 10, 1993

By the Commission:

1. The Commission has before it for consideration: (a) an "Application for Review" filed May 14, 1992, by Southwest Educational Media Foundation of Texas, Inc. ("SEMFOT") and (b) an "Opposition to Application for Review" filed May 28, 1992, by Southwestern Broadcasting Corporation ("Southwestern"). By letter dated April 15, 1992, the Chief, FM Branch, Mass Media Bureau ("Bureau"), acting by delegated authority, dismissed SEMFOT's application because it failed to comply with 47 C.F.R. § 73.203(a). SEMFOT now seeks Commission review of the Bureau's dismissal of its application. We deny the application for review for the reasons set forth below.

BACKGROUND

2. In *Table of Allotments, FM, Brownfield, TX,* 3 FCC Rcd 6158 (MMB 1988), (*"Brownfield, TX"*) the Commission amended the FM Table of Allotments at the request of Brownfield Broadcasting Corp. ("BBC"), licensee of Station KKTC(FM), by substituting Channel 282C2 for Channel 280A at Brownfield, Texas, effective December 5, 1988. Accordingly, the Commission modified the KKTC(FM) license, and ordered the filing of an appropriate modification application within 90 days of the effective date of the Order. However, BBC did not file its application to move to Channel 282 (File No. BPH-891026IC) until after the 90 day period specified in *Brownfield, TX.* Ultimately, that application was dismissed on March 17, 1992, because it was short-spaced to Station KKIK(FM), Lubbock, Texas.

3. In adopting *Brownfield, TX,* the Commission stated that a separate proposal to upgrade Station KKYN(FM) at Plainview, Texas, was contingent on the Brownfield allotment change. Effective February 12, 1990, the Commission substituted Channel 280C1 for Channel 280A at Plainview, Texas. *Table of Allotments, FM, Plainview, TX,* 4 FCC Rcd 8788 (MMB 1989) (*"Plainview, TX"*). However, because the Plainview 280C1 allotment and KKTC(FM)'s Channel 280 facilities were short-spaced, the Commission stated it would permit KKTC(FM) to remain on its existing frequency only until a construction permit was issued for Channel 280C1 at Plainview. The Commission also observed that KKTC(FM) either could effectuate the upgrade in accordance with *Brownfield, TX* or file an application to downgrade Channel 282C2 at Brownfield to Channel 282A. Finally, the Commission modified the license of the Plainview station operating on Channel 280, subject to the licensee's submission of a minor change application within 90 days of the effective date of *Plainview, TX.* Ultimately, the Plainview licensee filed an application for C2 facilities (BPH-901113IA), which was granted on April 28, 1992.

4. On March 15, 1990, BBC filed for renewal of license.[1] On June 29, 1990, SEMFOT filed its construction permit application for Channel 280A at Brownfield. The application reflects that it is mutually exclusive with the KLCU(FM) renewal application and that SEMFOT proposes to locate its transmitter at the tower used by KLCU(FM) to operate on Channel 280. SEMFOT's application was accepted for tender on September 24, 1990, and accepted for filing on June 13, 1991.

5. On July 15, 1991, Southwestern filed a petition to deny SEMFOT's application. Among other things, Southwestern alleged that SEMFOT's application was defective because it specified an unavailable channel in violation of 47 C.F.R. § 73.203(a) and because it was short-spaced to the Plainview allotment in violation of 47 C.F.R. § 73.207. The staff determined that SEMFOT had violated 47 C.F.R. § 73.203(a) and dismissed SEMFOT's application as inadvertently accepted for tender.

6. In its application for review, SEMFOT argues that the Bureau's dismissal of its application was "hyper-technical at best" because KLCU(FM) was still authorized to operate on Channel 280 at the time SEMFOT filed, and SEMFOT's filing was clearly meant to be mutually exclusive with the KLCU(FM) renewal application. In any event, SEMFOT contends that the channel change and upgrade for KLCU(FM) were expressly conditioned on the filing of a minor change application within 90 days of the effective date of *Brownfield, TX,* and no such application was filed until long afterward. Moreover, SEMFOT argues that *Plainview, TX* did not treat the Brownfield channel change as final because KLCU(FM) was not afforded protection for its upgrade. SEMFOT also contends that Plainview's upgrade was not final because that licensee did not file its modification application within the appropriate period. SEMFOT submits that, because neither the Brownfield nor Plainview allotment was entitled to protection, SEMFOT had no choice but to file on Channel 280. In view of the

[1] Prior to BBC's submission of its application to change channels, Station KKTC(FM) went off the air. Thereafter, on February 23, 1990, BBC filed an application to assign the KKTC(FM) (now KLCU(FM)) license to Southwestern. On May 4, 1990, the Commission granted the BBC/Southwestern assignment application, and the parties consummated the assignment on July 1, 1990. Neither BBC nor Southwestern has ever resumed broadcasting either on Channel 280 or Channel 282 at Brownfield, and neither has sought an extension of authority to remain silent. That matter is not germane to the issues here and will be addressed in a separate proceeding.

above, SEMFOT concludes that it should be allowed to amend its application to specify Channel 282 if the Commission ultimately grants an upgrade to Brownfield.

DISCUSSION

7. Although SEMFOT proposes a noncommercial educational station, it specified a non-reserved frequency. Thus, SEMFOT was subject to the requirements of 47 C.F.R. §§ 73.201 through 73.213. *See* 47 C.F.R. § 73.513. In addition, SEMFOT became subject to the "hard look" FM processing rules.[2]

8. At the time SEMFOT filed its application, the FM Table of Allotments, which appears at 47 C.F.R. § 73.202, showed only one channel allotted to Brownfield; namely, Channel 282C2. In addition, the FM Table of Allotments, as amended by *Plainview, TX*, showed Channel 280C1 at Plainview, Texas. Section 73.203(a) of the Commission's Rules states that: "[A]pplications may be filed to construct FM broadcast stations only at the communities and on the channels contained in the Table of Allotments (§73.202(b)). Applications that fail to comply with this requirements [sic], whether or not accompanied by a petition to amend the Table, will not be accepted for tender." Section 73.207(a) of the Commission's Rules provides, *inter alia*, that: "(a) The Commission will not accept ... applications for new stations ... unless transmitter sites meet the minimum distance separation requirements of this section ...."

9. In view of the above, the rules clearly required SEMFOT to specify Channel 282 at Brownfield. We therefore disagree with SEMFOT that the substitution of Channel 282 for Channel 280 at Brownfield was not final. *Brownfield, TX* clearly allotted Channel 282C2 to Brownfield and stated that the effective date for the amended allotment would be December 5, 1988. The only conditional aspects to *Brownfield, TX* concerned BBC's license and whether BBC would ultimately propose operation on *Channel 282* with a lower class of station pursuant to § 73.203(b).[3] BBC's action or inaction on its license modification was wholly unrelated to the finality of the allotment of Channel 282C2 to Brownfield. Thus, although BBC did not file its modification application prior to the expiration of the 90 day period specified in *Brownfield, TX*, any new applicant for Brownfield was obligated to specify Channel 282. Moreover, *Plainview, TX* did not treat the Brownfield channel change as conditional but merely observed that the Brownfield licensee could continue operating on Channel 280 until the issuance of a construction permit to the Plainview licensee for operation on Channel 280. *Plainview, TX* had no effect whatsoever on the rights and obligations of any applicant for a new station at Brownfield. Accordingly, by specifying Channel 280, SEMFOT violated 47 C.F.R. § 73.203(a).

10. In view of the allotment of Channel 280C1 at Plainview, it was also necessary for SEMFOT to propose an operation which complied with 47 C.F.R. § 73.207. By specifying Channel 280A at Brownfield, SEMFOT's proposal was short-spaced to Plainview. As with the Brownfield allotment, the only conditional aspect to the Plainview allotment was that it could be downgraded by the licensee pursuant to § 73.203(b). Thus, after the effective date of the Plainview allotment, any application for a new station at Brownfield had to protect the amended Plainview allotment. By specifying a location which was less than the required minimum distance of 200 kilometers between co-channel Class A and Class C1 stations, SEMFOT's proposed station was short-spaced and hence its application was unacceptable for filing. *Cf. American Indian Broadcast Group, Inc.*, FCC 92-390, released August 28, 1992. Moreover, *Royce International Broadcasting*, 2 FCC Rcd 1368 (MMB 1987) does not alter our view. There, the short-spacing between the renewal applicant and another station was "grandfathered," and it was determined that the renewal challenger could specify short-spaced facilities because the short-spacing would not increase. Here, there is no "grandfathering;" rather, the Brownfield licensee could remain on Channel 280 only until the Plainview station received its construction permit for its upgrade. Thus, unlike the challenger in *Royce*, SEMFOT could not specify the facilities then in use by the Brownfield renewal applicant because the Table of Allotments had already been amended and the Brownfield licensee was legally obligated to vacate Channel 280.

11. By specifying an unavailable channel, SEMFOT's application was unacceptable for tender. 47 C.F.R. § 73.203(a). *See also Appendix D*, 58 RR 2d at 167-68. In addition, by specifying Channel 280, SEMFOT's proposed facilities were short-spaced to Channel 280 in Plainview, thereby rendering SEMFOT's application unacceptable for filing. *See, Donovan Burke*, 60 RR 2d 110 (1986).

12. Accordingly, IT IS ORDERED that the Application for Review filed by SEMFOT on May 14, 1992, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[2] *See Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936, 19942 n.35 (May 13, 1985) (*"Hard Look Order"*), *recon. denied* 50 Fed. Reg. 43157 (October 24, 1985), *aff'd without opinion sub nom., Hilding v. FCC*, 835 F.2d 1435 (9th Cir. 1987). The *Hard Look Order* is reprinted at 58 RR 2d 776 (1985). Appendix D to the *Hard Look Order*, which was also issued separately as a Public Notice, is reprinted at 58 RR 2d 166 (1985) (*"Appendix D"*). Although the Commission recently modified the hard look rules, the Commission determined that applications filed prior to August 7, 1992, would continue to be processed under the rules in effect on the date of the application's receipt. *Report and Order, Commercial FM Broadcast Applications*, MM Docket No. 91-347, FCC 92-328, released July 27, 1992.

[3] In pertinent part, § 73.203(b) provides: "Applications for the modification of an existing FM broadcast station may propose a lower class of channel. In [such] cases, the applicant need not file a petition for rulemaking to amend the Table of Allotments ... to specify the lower channel class."

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-117

In the Matter of

Amendment to Section 1.773 of the
Commission's Rules Regarding
Pleading Cycle for Petitions
Against Tariff Filings Made on
14 Days' Notice

REPORT AND ORDER

Adopted: February 12, 1993; Released: March 11, 1993

By the Commission:

I. INTRODUCTION

1. On June 1, 1992, this Commission released a Notice of Proposed Rulemaking[1] to consider adjusting the pleading cycle for petitions seeking investigation, suspension, or rejection of tariff filings made on 14 days' notice under Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773. We now adopt the proposals in the *Pleading Cycle NPRM* with certain modifications. Specifically, in order to allow the Commission additional time to evaluate arguments against the lawfulness of tariffs filed on 14 days' notice, we now require that petitions be filed within six calendar days after the date of 14-day tariff filings and that subsequent replies be filed within three calendar days after the latest date that petitions could be filed. Because of this shortened pleading cycle, we also require that petitions be served in person or by facsimile on the filing carrier. Carriers retain the option to serve their replies to petitioners by mail.

II. BACKGROUND

2. The Commission has adopted streamlined review for a number of different types of tariff filings. For example, under price cap regulation, AT&T Communications (AT&T) and certain local exchange carriers (LECs) may file tariff transmittals for below-cap, within-band rate changes on 14 days' notice.[2] In addition, the *Interexchange Order* amended our rules to exclude most of AT&T's business services from price cap regulation and to streamline tariff review of these services.[3] Pursuant to the *Interexchange Order*, AT&T may file tariffs on 14 days' notice for most of its business services. Finally, non-dominant carriers are also allowed to file tariffs on 14 days' notice, and these filings are presumed lawful.[4] In allowing streamlined review of these various tariffs, the Commission has emphasized that such review is not equivalent to automatic acceptance of a rate or other tariff change; parties continue to have the opportunity to petition tariff filings and address issues such as discrimination.[5]

3. The Commission has been concerned that there is not adequate time to evaluate both petitions against 14-day filings and the carrier's response to these petitions because the pleading cycle for a 14-day tariff ends after the effective date of the tariff if a petition is served by mail.[6] Therefore, in order to allow interested parties time to respond to 14-day filings and the Commission time to evaluate these contentions prior to the effective date of the tariff, the Commission tentatively concluded in the *Pleading Cycle NPRM* that we must amend Section 1.773. We proposed shortening the periods for petitions and replies by one day each and counting intermediate holidays in computing both filing periods, making petitions due within six calendar days after the date of the filing and replies due within three calendar days after service of the petition. This change would give the Commission four days to consider the pleadings received after the pleading cycle closes.

4. The Commission also tentatively concluded that the shortened pleading cycle should be accompanied by a change in the rule for serving pleadings. Section 1.773 permits service by mail, which further lengthens the time within which pleadings must be filed with the Commission. We therefore proposed personal service for petitions and replies and sought comment on whether to permit facsimile (fax) service in addition to mailing a copy, as an alternative to personal service to parties other than the

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[1] Amendment to Section 1.773 of the Commission's Rules Regarding Pleading Cycle for Petitions Against Tariff Filings Made on 14 Days' Notice, Notice of Proposed Rulemaking, CC Docket No. 92-117, 7 FCC Rcd 3386 (1992)(*Pleading Cycle NPRM*).

[2] *See* Section 61.58(c)(2) of the Commission's Rules, 47 C.F.R. § 61.58(c)(2). *See also* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6822 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order)* (adopting 14-day filing rule for LECs), *modified on recon.* 6 FCC Rcd 2637 (1991), *petitions for further recon. pending, appeal docketed, D.C. PSC v. FCC,* No. 91-1279 (D.C. Cir. June 14, 1991); Report and Order and Second Further Notice, 4 FCC Rcd 2873, 3095-3100 (1989) and Erratum, 4 FCC Rcd 3379 (1989) (*AT&T Price Cap Order)* (adopting 14-day filing rule for AT&T), *modified on recon.* 6 FCC Rcd 665 (1991), *remanded in part, AT&T v. FCC,* No. 91-1178 (D.C. Cir. Sept. 8, 1992).

[3] Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd 5880 (1991)(*Interexchange Order), reconsidered in part,* Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further reconsideration,* 7 FCC Rcd 2677 (1992). AT&T's services offered to residential and small business customers, its 800 services and analog private line services remain subject to price cap regulation.

[4] *See* 47 C.F.R. § 61.58(b).

[5] *See, e.g., LEC Price Cap Reconsideration Order,* 6 FCC Rcd at 2697.

[6] Petitions against a tariff filed on less than 30 days' notice are due seven calendar days after the filing. Replies are due four days after service of the petition. Intermediate holidays are counted as part of the petition period; holidays are not counted as part of the reply period. In addition, a carrier served with a petition by mail has an additional three days to file its reply. *See* 47 C.F.R. § 1.773.

Commission. We received thirteen comments on the Commission's *Pleading Cycle NPRM* and nine replies to those comments.[7]

III. DISCUSSION

A. Filing of Petitions

5. To facilitate Commission evaluation of 14-day tariff filings, all commenters, except three, supported the proposal to require petitions to be filed within six calendar days after the date of the filing.[8] The Networks and TMA oppose the reduction from seven days to six days, arguing that the seven day filing period is already barely sufficient. TMA believes that the shortened pleading cycle will curtail the ability of parties with limited resources to respond to the filings.[9] The Networks suggest that if the Commission changes the filing period for a petition to six days it should require that the pleading cycle begin to run from the date the tariff filing appears in the publicly released tariff reference log.[10]

6. SWB disagrees with the Networks. It argues that if there is a time lag between the date of the tariff filing and the date the filing appears in the reference log, an affected party can request additional time to respond. Furthermore, says SWB, the Networks have not shown that they have ever been disadvantaged by such a time lag.[11]

7. In the context of evaluating 14-day tariff filings, we conclude that petitions seeking investigation, suspension, or rejection of such tariffs be filed within six calendar days after the date of the filing. Under the current rules, intermediate holidays have been counted as part of the seven day pleading cycle for petitions. Thus, this rule change effectively reduces the filing time for petitions by only one day. While a one-day reduction in the time petitioners have to respond to tariffs places slightly more burdens on petitioners, the alternatives (*e.g.* minimizing the reply cycle for carriers) create a process in which the carrier's reply is either not available at all or is available too soon before the tariff effective date to permit consideration of all arguments. We believe that this slight modification of the petition cycle from seven days to six will allow the Commission to achieve its goal of full consideration of arguments against 14-day filings in the least burdensome manner to petitioners.[12]

8. The Commission will not adopt the Networks' proposal to begin the pleading cycle for petitions on the date the tariff filing appears on the public reference log. As US West notes, the Commission in this proceeding is synchronizing the tariff pleading cycle with the 14-day tariff notice requirement.[13] The Networks' proposal is a fundamental alteration of existing notice requirements under Section 61.58(a)(1) of our rules, 47 C.F.R. § 61.58(a)(1), which states that notice of a tariff filing is accomplished by filing the proposed tariff changes with the Commission. Thus, the notice period for a tariff filing begins on the date the filing is received at the Commission. The tariff reference log is merely an unofficial listing of tariff transmittal compiled for the convenience of the public.

B. Filing of Replies

9. AT&T and Ameritech supported the proposed rule change to require that replies be filed within three calendar days after the petitions are filed. However, they suggested that we clarify the rule to require that replies be due three days after the latest date that petitions could be filed. The commenters pointed out that multiple petitions against a tariff are often filed on different dates and the rule change, as proposed in the *Pleading Cycle NPRM*, seemed to indicate that piecemeal replies would be due three days after each petition is filed, when a single reply will often suffice to respond to issues raised by multiple petitioners.[14]

10. Some carriers argued that the proposed three calendar day period for filing replies is not enough time to draft an adequate response. Bell Atlantic insists carriers need at least two business days to prepare and file a reply, which is not the case if a petition is filed on Friday with the reply due to the Commission on Monday.[15] SWB believes carriers should have three business, not calendar, days to file a reply.[16] US West states that carriers should have three days to file a reply, excluding intervening holidays.[17] USTA argues that carriers should have at least one full working day to reply to a petition and that the Commission should prohibit the filing of a petition on a day that would cause the time for reply to expire on a weekend, or we should change the pleading cycle to five calendar days for petitions and four calendar days for replies.[18]

11. As an initial matter, the Commission agrees with the commenters who suggested that replies be due three days after the latest date upon which a petition could be filed. By incorporating this clarification, we bring certainty to the date on which a reply is due and eliminate any possibility that replies to multiple petitions might be required in different time frames. We do not, however, adopt the various proposals suggesting that we extend the carriers' reply time. This Commission is reducing the reply time by only one day and counting holidays as part of the reply cycle. We do not believe that this will unduly burden the filing carriers; it will, however, allow thorough Commission review of both sides of the issues. In addition, the filing carriers initiate the pleading cycle by filing tariff

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[7] *See* Appendix A to this Report and Order for a complete list of commenters and acronyms used herein for these commenters.

[8] AT&T Comments at 2; Ameritech Comments at 1; Bell Atlantic Comments at 1; BellSouth Comments at 2; GTE Comments at 1-2; IRA Comments at 1; MCI Comments at 1; Pacific Bell Comments at 1; SWB Comments at 1; USTA Comments at 1; US West Comments at 2. ARINC, the Networks and TMA oppose the proposed rule change.

[9] TMA Comments at 2.

[10] *Id.* at 4-5.

[11] SWB Reply at 3 n.4.

[12] We also make a minor amendment to Section 1.773(a)(1) to remove the requirement that when a petitioner seeks more than one form of relief in a single petition, it set forth the arguments separately. Petitioners often file one petition seeking investigation, suspension, or rejection and their arguments for one or more of these forms of relief often overlap. To promote briefer pleadings this procedural change is justified.

[13] US West Reply at 3. *See also* BellSouth Reply at 3-4.

[14] AT&T Comments at 2 n.2; Ameritech Comments at 2. *Accord* BellSouth Reply at 2; Pacific Bell Reply at 2; SNET Reply at 1; SWB Reply at 2.

[15] Bell Atlantic Comments at 2. *Accord* GTE Reply at 2.

[16] SWB Reply at 1.

[17] US West Comments at 2-3.

[18] USTA Comments at 2.

transmittals. If a carrier is particularly concerned about when its reply will be due, it can time its tariff filing with the Commission to ensure that the time to reply does not span a weekend. It is to the carrier's benefit for the Commission to have adequate time to consider its responsive arguments. Furthermore, the service requirements we impose upon the petitioners to serve filing carriers either personally or by fax, as discussed below, will ensure that the carriers receive petitions more expeditiously than they do now.[19]

C. Service Requirements

12. Almost all parties to this proceeding agreed that personal service is appropriate for service of petitions against 14-day filings. Many suggested certain safeguards and modifications to our proposal to ensure effective service. GTE and US West suggest that the personal service requirement be limited to petitioners having to serve carriers with Washington, D.C. offices or designated domestic representatives in domestic offices.[20] GTE suggests that if a carrier does not have a Washington, D.C. or at least a domestic representative, then a petitioner can serve the carrier via fax.[21]

13. Most commenters supported our proposal that service via fax is an effective alternative to personal service. Various commenters pointed out that Section 61.33 of the Commission's Rules, 47 C.F.R. § 61.33, should be amended to include a provision that transmittal letters for 14-day tariff filings contain the appropriate person and fax number for service.[22] TMA and MCI commented that service by fax, followed by mailing, is an effective and less costly way to achieve same day service.[23] Some carriers request that petitioners telephone the carrier to confirm service of the petition by fax.[24] AT&T suggests that the Commission should not impose such a specific requirement but instead encourage the parties to agree on procedures to ensure service is accomplished.[25] Pacific Bell opposes service by fax, arguing that faxes are frequently not received and that a mailed copy would arrive too late for the carrier to respond to it.[26] GTE suggests a further alternative to personal service: participants without fax capabilities should be able to use commercial overnight mail to deliver the petition to the filing carrier's street address or post office box.[27]

14. Several carriers argued that they should not be required to personally serve the reply on petitioners since Commission rules do not permit petitioners to respond to replies.[28] ARINC disagrees. It argues that petitioners must have timely service of replies in order to address any inaccuracies made by the carriers.[29]

15. After careful review of all these comments, petitioners may serve their pleading on the filing carrier either personally to the carrier's designated domestic or Washington, D.C. representative or via facsimile. We believe that fax service is a reasonable and effective alternative to parties who are unable to serve a petition upon a filing carrier personally. Several commenters suggest that the Commission impose requirements on the parties to telephone each other before and after service by fax. We reject formally mandating such a procedure but encourage all parties in 14-day tariff proceedings to use normal business practices to ensure that fax service is timely accomplished. However, we do require petitioners who choose service by fax to send a follow-up copy of their petition to the carrier via first class mail.

16. To facilitate the alternative of fax service and avoid routing delays, we also amend Section 61.33 of our rules, 47 C.F.R. § 61.33, to require all letters of transmittals for 14-day tariff filings to include an address and designated individual for personal service and a fax number for fax service. Fax service to this designated number will satisfy our service requirements.[30]

17. IRA recommends we implement a "Tariff Transmittal Notification" process under which carriers would fax transmittal pages to parties who have identified themselves as "interested" in specific 14-day filings so that they receive prompt notice of the filing.[31] The Networks argue that carriers should be required to notify their affected customers in writing of the proposed tariff changes no later than the tariff filing date.[32] We reject these proposals.[33]

18. Finally, we have decided to continue to allow filing carriers the option to serve their replies on petitioners by mail. We agree with the commenters who noted that it is unnecessary for carriers to personally serve their reply on petitioners since petitioners can not file a response. It is, of course, mandatory that carriers file their reply at the Commission within three calendar days of the last date for a timely-filed petition, as we discussed above.

IV. CONCLUSION

19. In order to allow the Commission time to evaluate arguments against the lawfulness of tariffs filed on 14 days' notice, we now require that petitions seeking investigation, suspension, or rejection of these tariffs be filed within six calendar days after the date of the filing. We require that replies be filed within three calendar days after the latest date that petitions could be filed. Because of this shortened pleading cycle, we also require that petitions be served in person or by facsimile on the filing carrier. Petitioners who choose service by fax must send a follow-up copy of their

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[19] *See* BellSouth Comments at 2, stating that it supports the reduction in reply time as long as the personal service requirement is clearly imposed.

[20] GTE Comments at 2; US West Comments at 4.

[21] US West Comments at 4.

[22] Bell Atlantic Comments at 2-3; BellSouth Comments at 5-6; GTE Comments at 3; MCI Comments at 3; SWB Comments at 3-4. *Accord* SNET Reply at 2.

[23] TMA Comments at 4.

[24] Bell Atlantic Comments at 2-3; BellSouth Comments 5-6.

[25] AT&T Comments at 3.

[26] Pacific Bell Comments at 3.

[27] GTE Comments at 3.

[28] BellSouth Comments at 7; SWB Comments at 4; US West Comments at 4-5. *Accord* GTE Reply at 2; Pacific Bell Reply at 1.

[29] ARINC Reply at 4 n.8.

[30] The Commission rejects the suggested option to permit petitioners to serve pleadings upon the filing carrier via overnight commercial mail because of the delay that could result.

[31] IRA Comments at 2. *Contra* Ameritech Reply at 1-2; Bell Atlantic Reply at 1-2; BellSouth Reply at 3; GTE Reply at 3; SWB Reply at 3; US West Reply at 5.

[32] Networks' Comments at 5 n.3.

[33] We remind parties that the kind of service suggested by IRA and the Networks is already available to the public through several photocopy establishments in Washington, D.C.

petition to the carrier via first-class mail. Carriers retain the option to serve their replies to petitioners by mail. Finally, we also amend Section 61.33 of our rules, 47 C.F.R. § 61.33, to require all letters of transmittals for 14-day tariff filings to include an address and designated individual for personal service and a fax number for fax service.

V. REGULATORY FLEXIBILITY ACT

20. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

21. **Need and Purpose of this action:** The Commission is adopting this Report and Order to provide the Commission additional time to review pleadings filed in 14-day tariff proceedings. The Order reduces the pleading cycles by one day and requires parties to serve petitions either personally or via facsimile.

22. **Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis.** No comments were received.

23. **Significant alternatives considered and rejected.** Because this Order reduces the pleading cycle by one day for petitions and one day for replies, with intervening holidays counted as part of both filing periods, and permits personal or fax service alternatives, we conclude that interested parties should not be precluded from participating in 14-day tariff proceedings and that small entities should experience no significant economic impact from this minor rule adjustment.

VI. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED that the policies, rules and requirements set forth herein ARE ADOPTED.

25. IT IS FURTHER ORDERED that pursuant to authority contained in Sections 1, 4(i), and 201-204 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, and 201-204, Part 1 and Part 61 of the Commission's Rules, 47 C.F.R. Part 1 and Part 61, ARE AMENDED as set forth in Appendix B.

26. IT IS FURTHER ORDERED that the provisions in this Report and Order will be effective 30 days after FEDERAL REGISTER publication.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

CC Docket No. 92-117

COMMENTS:

American Telephone and Telegraph Company (AT&T)

Ameritech Operating Companies (Ameritech)

Bell Atlantic Telephone Companies (Bell Atlantic)

BellSouth Telecommunications, Inc. (BellSouth)

Capital Cities/ABC Inc., CBS Inc., National Broadcasting Company, Inc., and Turner Broadcasting System, Inc. (The Networks)

GTE Service Corporation (GTE)

Interexchange Resellers Association (IRA)

MCI Telecommunications Corporation (MCI)

Pacific Bell and Nevada Bell Companies (Pacific Bell)

Southwestern Bell Telephone Company (SWB)

Telecommunications Marketing Association (TMA)

United States Telephone Association (USTA)

US West Communications, Inc. (US West)

REPLY COMMENTS:

Ameritech

Aeronautical Radio, Inc. (ARINC)

Bell Atlantic

BellSouth

GTE

Pacific Bell

Southern New England Telephone Company (SNET)

SWB

US West

APPENDIX B

Amendments to the Code of Federal Regulations

Title 47 of the Code of Federal Regulations, Parts 1 and 61 are amended as follows:

PART 1--PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended, 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. Section 1.4 is amended by revising paragraph (g) introductory text to read as follows:

§ 1.4 Computation of Time

* * * * *

(g) Unless otherwise provided (e.g., § 1.773 of the Rules), if the filing period is less than 7 days, intermediate holidays shall not be counted in determining the filing date.

* * * * *

3. Section 1.773 is amended by revising paragraph (a)(1), the first sentence of paragraph (a)(1)(i) and the first and last sentences of paragraph (a)(2); redesignating paragraphs (a)(2)(i) through (iii) as paragraphs (a)(2)(ii) through (iv) and revising them; adding new paragraph (a)(2)(i); adding

paragraph (a)(4); redesignating paragraphs (b)(1)(i) through (iv) as (b)(1)(ii) through (v) and revising them; adding new paragraph (b)(1)(i); revising paragraph (b)(2), and redesignating paragraph (c) as (b)(3) and revising it, to read as follows:

§ 1.773 Petitions for suspension or rejection of new tariff filings.

(a) *Petition-(1) Content.* Petitions seeking investigation, suspension, or rejection of a new or revised tariff filing or any provision thereof shall specify the filing's Federal Communications Commission tariff number and carrier transmittal number, the items against which protest is made, and the specific reasons why the protested tariff filing warrants investigation, suspension, or rejection under the Communications Act. No petition shall include a prayer that it also be considered a formal complaint. Any formal complaint shall be filed as a separate pleading as provided in § 1.721.

(a)(1)(i) Petitions seeking investigation, suspension, or rejection of a new or revised tariff filing or any provision of such a publication, must specify the pertinent Federal Communications Commission tariff number and carrier transmittal number; the matters protested; and the specific reasons why the tariff warrants investigation, suspension, or rejection. * * *

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(2) *When filed.* All petitions seeking investigation, suspension, or rejection of a new or revised tariff filing shall meet the filing requirements of this paragraph. * * * Thereafter, the request shall be confirmed by petition filed and served in accordance with § 1.773(a)(4).

(i) Petitions seeking investigation, suspension, or rejection of a new or revised tariff filing made on less than 15 days notice shall be filed and served within 6 days after the date of the tariff filing.

(ii) Petitions seeking investigation, suspension, or rejection of a new or revised tariff filing made on at least 15 but less than 30 days notice shall be filed and served within 7 days after the date of the tariff filing.

(iii) Petitions seeking investigation, suspension, or rejection of a new or revised tariff filing made on at least 30 but less than 90 days notice shall be filed and served within 15 days after the date of the tariff filing.

(iv) Petitions seeking investigation, suspension, or rejection of a new or revised tariff filing made on 90 or more days notice shall be filed and served within 25 days after the date of the tariff filing.

* * * * *

(4) *Copies, Service.* An original and 4 copies of each petition shall be filed with the Commission and separate copies served simultaneously upon the Chief, Common Carrier Bureau, and the Chief, Tariff Division. Petitions seeking investigation, suspension, or rejection of a new or revised tariff filing made on less than 15 days notice shall be served either personally or via facsimile on the filing carrier. If a petition is served via facsimile, a copy of the petition must also be sent to the filing carrier via first class mail on the same day of the facsimile transmission. Petitions seeking investigation, suspension, or rejection of a new or revised tariff filing made on 15 or more days notice may be served on the filing carrier by mail.

(b)(1) * * *

(i) Replies to petitions seeking investigation, suspension, or rejection of a new or revised tariff filing made on less than 15 days notice shall be filed and served within 3 days after the date the petition is due to be filed with the Commission.

(ii) Replies to petitions seeking investigation, suspension, or rejection of a new or revised tariff filing made on at least 15 but less than 30 days notice shall be filed and served within 4 days after service of the petition.

(iii) Replies to petitions seeking investigation, suspension, or rejection of a new or revised tariff filing made on at least 30 but less than 90 days notice shall be filed and served within 5 days after service of the petition.

(iv) Replies to petitions seeking investigation, suspension, or rejection of a new or revised tariff filing made on 90 or more days notice shall be filed and served within 8 days after service of the petition.

(v) Where all petitions against a tariff filing have not been filed on the same day, the publishing carrier may file a consolidated reply to all the petitions. The time for filing such a consolidated reply will begin to run on the last date for timely filed petitions, as fixed by (a)(2)(i)-(iv) of this section, and the date on which the consolidated reply is due will be governed by (b)(1)(i)-(iv) of this section.

(b)(2) *Computation of time.* Intermediate holidays shall be counted in determining the 3-day filing date for replies to petitions seeking investigation, suspension, or rejection of a new or revised tariff filing made on less than 15 days notice. Intermediate holidays shall not be counted in determining filing dates for replies to petitions seeking investigation, suspension, or rejection of a new or revised tariff filing made on 15 or more days notice. When a petition is permitted to be served upon the filing carrier by mail, an additional 3 days (counting holidays) may be allowed for filing the reply. If the date for filing the reply falls on a holiday, the reply may be filed on the next succeeding business day.

(b)(3) *Copies, Service.* An original and 4 copies of each reply shall be filed with the Commission and separate copies served simultaneously upon the Chief, Common Carrier Bureau, and the Chief, Tariff Division, and the petitioner. Replies may be served upon petitioner personally, by mail or via facsimile.

PART 61--TARIFFS

4. The authority citation for Part 61 continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply sec 203, 48 Stat. 1070; 47 U.S.C. 203.

5. Section 61.33 is amended by redesignating paragraphs (d),(e), and (f) as paragraphs (e), (f), and (g), and adding a new paragraph (d), to read as follows:

§ 61.33 Letters of Transmittal.

* * * * *

(d) In addition to the requirements set forth in paragraph (a) of this section, any carrier filing a new or revised tariff made on less than 15 days' notice must include in the letter of transmittal the name, room number, street address, telephone number, and facsimile number of the individual

designated by the filing carrier to receive personal or facsimile service of petitions against the filing as required under § 1.773(a)(4) of this chapter.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

DAVIDSON COUNTY BROADCASTING COMPANY, INC. — File Nos. BPH-870227IF, BPH-920218JE

For Construction Permit for
a Minor Modification of Facilities
for Station WWGL(FM),
Lexington, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: March 1, 1993; Released: March 10, 1993

By the Commission:

1. The Commission has under consideration the application for review filed on December 30, 1991 (and supplemented on December 31, 1991), by WWMY-FM Broadcasting, Inc., licensee of Station WNEU(FM) (formerly WMKG), Eden, North Carolina ("WNEU"). WNEU seeks review of the action of the Mass Media Bureau denying reconsideration of the grant of the above-captioned application of Davidson County Broadcasting Company, Inc. for a construction permit for a minor modification of the facilities for Station WWGL(FM), Lexington, North Carolina ("WWGL").[1] *See Letter from Chief, Audio Services Division to Counsel for WWGL (Ref. 8920-GDG)*, dated November 29, 1991 ("*Recon. Letter*"). WWGL operates on a second-adjacent channel to WNEU. We deny the application for review for the reasons set forth below.[2]

BACKGROUND

2. WWGL is classified as a Class C station and currently operates with an effective radiated power ("ERP") of 100 kilowatts ("kW") at a height above average terrain ("HAAT") of 148 meters (485 feet). However, effective March 1, 1984, we modified our station class definitions and required that Class C stations operate with a minimum HAAT of 300 meters (984 feet).[3] Existing Class C stations operating at less than the minimum HAAT were required, by March 2, 1987, to file an application to comply with this requirement.[4] On February 27, 1987, WWGL filed its captioned application proposing to increase, to more than 300 meters, the HAAT at its existing transmitter site. Because the application did not eliminate the present short-spacing to WNEU (which has existed since 1964), WWGL sought processing under the "grandfathered" station rule, Section 73.213.

3. After discussions between WWGL's airspace consultant and the FAA revealed that the originally-proposed site might not receive clearance, WWGL promptly amended the application on November 9, 1987, to change its transmitter site and further increase its proposed HAAT.[5] This site also required FAA clearance. By letter dated May 27, 1988, the staff requested WWGL to indicate the status of any negotiations with the FAA pertaining to the amended site. On June 28, WWGL responded that the "air traffic considerations ... are apparently complex and have required significant study by the FAA" but that, in any event, the FAA had indicated that it would shortly complete its study of WWGL's tall tower proposal. Then, on November 1, 1988, still not having received FAA clearance, WWGL's airspace consultant requested the FAA to modify the ongoing aeronautical study to focus on a third site which, the consultant believed, would no longer be in the "VFR route." About three weeks later, on November 23, the FAA issued a "no hazard" determination for this alternative site. By letter submitted March 7, 1989, counsel for WWGL informed the Commission that in December WWGL had prepared an amendment specifying the third site. However, WWGL observed, the Commission had adopted new contour overlap rules for commercial FM stations on December 12, 1988. WWGL desired to wait until after the new rules went into effect to file the amendment. The order adopting the new rules specified the effective date as April 14, 1989. *Report and Order* in MM Docket No. 87-121, 4 FCC Rcd 1681, 1688 (1989) (adopting new Section 73.215).

4. On May 3, 1989, WWGL amended its application to specify the FAA-cleared site and requested waiver of Section 73.207 or, in the alternative, processing pursuant to Section 73.215. In the petition for waiver accompanying the amendment, WWGL attached a copy of the FAA's confirmation, dated March 20, 1989, that the site proposed in WWGL's application as originally filed "would cause substantial adverse affects upon air navigation" unless the proposed height was reduced substantially.[6] The request also included a copy of the FAA's November 23, 1988 no hazard determination for the site proposed in the May 3rd amendment. By letter dated September 29, 1989, although

[1] The application for review is opposed by WWGL and by Wake Forest University, licensee of noncommercial educational FM Station WFDD, Winston-Salem, North Carolina ("WFDD"), which desires to co-locate its antenna on the new tower proposed in WWGL's application. WNEU has filed a reply. Also, by letter dated March 2, 1992, WFDD submitted comments from several of its listeners which support the WWGL application. In response, on March 26, 1992, WNEU filed a motion to strike that letter and comments. We will grant the WNEU motion and strike as irrelevant the WFDD letter and comments.

[2] Also, on October 28, 1992, WNEU filed a petition for reconsideration of the Bureau's grant of WWGL's application (BPH-920218JE) to reinstate its construction permit. We address this matter in note 13, *infra*.

[3] *Report and Order* in MM Docket No. 80-90, 48 Fed. Reg. 29486, published June 27, 1983, 94 FCC 2d 152, 183, *recon. granted in part and denied in part*, 49 Fed. Reg. 10260, published March 20, 1984, 97 FCC 2d 279, 283; *Notice of Proposed Rule Making* in MM Docket No. 84-231, 49 Fed. Reg. 11214, at para. 3, published March 26, 1984.

[4] Failure to do so would result in reclassification to the actual, lesser station class, in this case Class C1.

[5] *See* WNEU App. Rev. at Exh. 4 (discussions held during October 1987 between WWGL's airspace consultant and the FAA pointed to "substantial adverse effect upon VFR traffic").

[6] At the reduced height suggested by the FAA, use of WWGL's original site could no longer conform to the Class C minimum HAAT requirement. Thus, the site change proposed in the May 3 amendment was critical to WWGL's continued viability as a Class C facility.

finding good cause for considering the amendment in conjunction with the application, the staff returned the amendment as unacceptable for tender because the effectiveness of Section 73.215 had been stayed until June 26, 1989.[7] Nevertheless, the staff provided WWGL 30 days in which to refile an amendment which cured all deficiencies in the application, pursuant to the Commission's policy on "Reclassification of FM Facilities Pursuant to BC Docket 80-90" set forth in *Public Notice,* 52 Fed. Reg. 10757 (April 3, 1987), 2 FCC Rcd 2124.[8] By letter dated October 27, 1989, counsel for WWGL requested an extension of time until November 29 in which to respond, indicating that he was not served with a copy of the staff letter. WWGL also noted that its consulting engineer had met with Commission technical staff and had resolved technical questions raised by the staff. On November 28, 1989, WWGL resubmitted its May 3 amendment with additional clarifying material. On January 24, 1990, the staff granted the application as thus amended.

5. Thereafter, WNEU entered the picture for the first time on March 8, 1990, when it filed a petition for reconsideration of the WWGL grant. WNEU challenged the timeliness and acceptance for good cause of WWGL's May 3 and November 28, 1989 amendments. In the *Recon. Letter,* the Bureau, citing Section 1.106(b)(1) of the Rules, dismissed the WNEU petition because it had not shown good reason why it was not possible for it to raise this issue earlier. The Bureau also disagreed with WNEU on the merits.

DISCUSSION

6. In its application for review, WNEU asserts that its petition for reconsideration was not procedurally defective because, although a petition to deny does not lie against a minor change application, such as WWGL's, WNEU's interests were nevertheless adversely affected.[9] In addition, WNEU renews its claim that WWGL's amendments of May 3 and November 28, 1989 were not accompanied by good cause. Therefore, WNEU concludes, the acceptance of these amendments should have led the staff to assign a new file number to WNEU's application. Had the staff done so, WNEU argues, the November 9, 1987 and subsequent amendments would have been subject to the revised and more restrictive provisions of Section 73.213, which became effective that same day. *See Second Report and Order,* MM Docket No. 86-144, 2 FCC Rcd 5693, 52 Fed. Reg. 37786 (October 9, 1987). In turn, the revised rule would have precluded WWGL from obtaining the changes it sought, which were acceptable under the old rule.

7. We disagree with all of WNEU's arguments. As a procedural matter, we adopt the Bureau's analysis that WNEU's petition for reconsideration was defective. WNEU could have filed an informal objection against the WWGL application but failed to do so.[10] In this regard, we note that WWGL's existing licensed facility and its proposed facility as described in its application, both as originally filed on February 27, 1987 and as subsequently amended on November 9, 1987, May 3, 1989, and November 28, 1989, are short-spaced to WNEU.[11] A petition for reconsideration of the ultimate grant of an application is not a proper means to challenge in the first instance staff action on an amendment to the underlying application. *See* 47 C.F.R. § 1.106(b)(1),(c); *Springfield Television Broadcasting Corp. v. FCC,* 328 F.2d 186 (D.C. Cir. 1964); *see also Simon Geller,* 91 FCC 2d 1253, 1254-1255 (1982), *aff'd in pertinent part sub nom. Committee for Community Access v. FCC,* 737 F.2d 74, 84 (D.C. Cir. 1984). To hold otherwise would encourage inordinate delays in application processing and could lead to severe wastage of limited staff resources.

8. As a substantive matter, the extended chronological background detailed above shows that WWGL was faced with complex FAA clearance problems but was consistently diligent in addressing them. Its application was timely filed before the applicable March 2, 1987 deadline to specify minimum Class C facilities, and its amendments were timely, as well as involuntary, given the delays caused by the FAA problems and by the effects of changing Commission rules regarding short-spacing and the use of directional antennas. WWGL's October 27, 1989 request for an extension of time demonstrated that the applicant's engineering

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[7] The staff also identified several other deficiencies in the amendment which are not pertinent here.

[8] The *Public Notice* provides in pertinent part:

> We recognize that many applications filed by existing stations before the March 2, 1987 deadline to specify minimum class . . . C facilities were not reached for processing by [this] filing deadline. Should such applications be found deficient after this deadline, we believe the public interest is best served by providing these licensees one opportunity to correct all deficiencies in their applications before the application is returned. Accordingly, upon finding a defect in [such] timely filed application . . . , the staff on its own motion may waive the "hard-look" FM processing rules . . . and [provide the applicant] 30 days to correct . . . deficiencies.

[9] WNEU also asserts that its own minor change applications (BPH-870812IB renumbered as BPH-880708IA, and BMPH-890419IC) were treated in a manner dissimilar from the treatment accorded WWGL's application. On October 19, 1989, the staff dismissed the latter application and denied reconsideration of the grant of the former, renumbered application. To the extent WNEU seeks to use its application for review as a vehicle for appealing the staff's actions pertaining to its own applications, that pleading is procedurally defective. The time for appealing those actions, pursuant to Sections 1.106 and 1.115 of the Rules, has passed and, therefore, they are final. Moreover, since none of the WNEU applications was a timely filed proposal to avoid reclassification to a lower station class, the applicable procedures for processing them differ from those applicable to WWGL's application. *Compare supra* paras. 2, 4 & nn.3 -4, 8.

[10] Public notice was given of the filing of WWGL's amendments of May 3 and November 28, 1989. *See Public Notices,* "Broadcast Applications," Report No. 14470, released May 22, 1989, at p. 12, and Report No. 14621, released December 14, 1989, at p. 10. WNEU could have filed an informal objection in response to these actions; nevertheless, it failed to do so.

[11] In fact, WWGL's existing licensed facility and its proposed facility described in the application as originally filed are spaced 50.1 kilometers ("km") from WNEU's existing facility. The proposal as amended on November 9, 1987 is spaced 54.8 km from WNEU. The proposals of May 3 and November 28, 1989 are both spaced 58.7 km from WNEU. In other words, the amended proposals *increase* WWGL's spacing from WNEU.

consultant resolved technical questions with the Commission's staff, and further explained that its counsel's receipt of the September 29 Bureau letter was delayed because it was not properly served upon him.[12] In sum, contrary to the position advanced by WNEU, we specifically find that WWGL demonstrated good cause for the acceptance of its November 28 amendment. *See Erwin O Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970). Therefore, WWGL was entitled to have its amendments processed under the Section 73.213 provisions in effect on February 27, 1987, the date of filing of its original application. We thus affirm the staff's grant of the WWGL application as amended.[13]

9. ACCORDINGLY, IT IS ORDERED, That the motion to strike filed on March 26, 1992 by WWMY-FM Broadcasting, Inc. IS GRANTED, and the letter dated March 2, 1992 and attached comments submitted by Wake Forest University ARE STRICKEN.

10. IT IS FURTHER ORDERED, That the Application for Review filed on December 30, 1991 (and supplemented on December 31, 1991) and the Petition for Reconsideration filed on October 28, 1992 by WWMY-FM Broadcasting, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[12] Also, WNEU argues that discussions between WWGL's airspace consultant and the FAA, held during October 1987 and dealing with "substantial adverse effects upon VFR traffic," undermine WWGL's claim to "good cause" for the site change amendment filed on May 3, 1989. *See* WNEU App. Rev. at Exh. 4 (purported notes from those discussions). We disagree. Assuming *arguendo* the substantive reliability of the discussion notes contained in Exh. 4, we nevertheless infer from the chronology that the discussions led to the earlier, November 9, 1987 amendment and were not directly germane to the 1989 amendment. We note that WNEU has not addressed the legal significance of the 1987 amendment in analyzing the chain of good cause. Thus, we can only infer that WNEU's reasoning presumes that, when WWGL filed the 1987 amendment, WWGL must have had reason to know that the FAA would ultimately not clear that proposal. We reject this argument as entirely speculative.

[13] During the pendency of the application for review, WWGL's construction permit for its captioned application expired. However, on February 18, 1992, WWGL filed an application (BPH-920218JE) for reinstatement of the permit. WNEU filed an informal objection against that application. The staff denied the informal objection and granted the reinstatement application. *See Letter from Chief, Audio Services Division to WWGL and WNEU (Ref. 1800B3-JWR)*, dated September 21, 1992. Then, on October 28, 1992, WNEU filed a petition for reconsideration of that staff action. We have afforded that petition expeditious consideration and fully agree with the staff's action and its rationale. Therefore, we deny the petition for reconsideration, adopt the staff's letter, and affirm the reinstatement of WWGL's permit. The Commission routinely grants extensions of time to construct during the pendency of any appeals directed to the grant of the underlying permit. This practice prevents permittees from having to take the undue financial risk of constructing a facility whose permit may later be rescinded. *Cf. Special Markets Media, Inc.*, 4 FCC Rcd 5753 (1989) (granted authorizations "cannot, as a matter of law and Commission application processing policy, become final until any outstanding appeals have been adjudicated"). Moreover, contrary to WNEU's argument, the situation here is not analogous to MMDS cases involving Section 21.44 of the Rules. That rule provides that expired MMDS permits are automatically forfeited. In the broadcast service, an expired permit is not forfeited automatically; instead, further action by the staff is required in accordance with Sections 73.3534 and 73.3599 of the Rules. *See Baker v. FCC*, 834 F.2d 181, 185 (D.C. Cir. 1987); *MG-TV Broadcasting Co. v. FCC*, 408 F.2d 1257, 1261 (D.C. Cir. 1968); *Mass Communicators, Inc. v. FCC*, 266 F.2d 681, 683-685 (D.C. Cir. 1959).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 10, 1993

NEVADA BELL AND OREGON-IDAHO UTILITIES, INC., PETITION FOR WAIVER OF PART 36 APPENDIX GLOSSARY AND SECTION 61.41(c) OF THE COMMISSION'S RULES.

Comments: April 15, 1993
Reply Comments: April 30, 1993

On February 2, 1993, Nevada Bell and Oregon-Idaho Utilities, Inc., (OIU) filed a joint petition for waiver of the definition of "study area" contained in Part 36 of the Commission's rules. This waiver would allow six exchanges to be removed from Nevada Bell's study area and become a single, separate study area of OIU. Subsequently, OIU filed a petition for waiver of the Price Caps rules found at CFR 61.41(c) of the Commission's rules, which would allow OIU to remain a cost company and a participant in NECA pools. No state approval has yet been granted.

Parties may file comments on this petition no later than **April 15, 1993.** Replies should be filed by **April 30, 1993.** Comments should reference AAD 93-20. A copy of each pleading should be sent to Jacqueline Spindler, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and to International Transcription Services, Inc., (ITS Inc.), 2100 M Street, N.W., Suite 140, Washington, DC 20037, (202) 857-3800. Copies are available for public inspection and copying in the Room 812, Washington D.C.; copies are also available from ITS.

For further information contact Jacqueline Spindler at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 22, 1993

PETITION FOR WAIVER OF HEARING-AID COMPATIBILITY REQUIREMENTS FOR GOODWILL INDUSTRIES OF SEATTLE, WASHINGTON

On February 9, 1993, pursuant to 47 CFR Section 1.3, Goodwill Industries of Seattle petitioned the Commission for a waiver of the hearing-aid compatibility requirement for its location at 1400 South Lane Street, Seattle, Washington 98144. *See Report and Order,* released June 4, 1992, 7 FCC Rcd 3472.

Copies of the petition, and comments when filed, may be inspected and copied at the Common Carrier Bureau, Domestic Facilities Division Reference Room, room 6220, 2025 M Street N.W., Washington, D.C., Monday through Thursday from 8:30 a.m. to 3:00 p.m. Copies are also available from ITS, Inc., 1919 M St., N.W. Washington, D.C. (202)632-7513. Comments regarding the Goodwill petition may be filed on or before March 5, 1993. Reply comments are due by March 25, 1993. For general information on how to file comments, parties should contact the FCC Consumer Assistance and Information Division at (202) 632-7000.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-166

PUBLIC NOTICE

Released: March 2, 1993

MSS Above 1 GHz Negotiated Rulemaking Committee

Agency: Federal Communications Commission

Action: Notice of Cancellation of public meetings.

Summary: In accordance with the Federal Advisory Committee Act, Public Law 92-463, as amended, this notice advises interested persons that the meeting of the MSS Above 1 GHz Negotiated Rulemaking Committee ("Committee") scheduled for Thursday, March 4, 1993 has been cancelled. This meeting was originally announced in Public Notice, DA 93-163 (58 FR 8927 (February 18, 1993)).

For additional information contact: Kathleen Campbell, Administrative Assistant to the Committee, at (202) 634-1952.

Supplementary Information: Subsequent Full Committee meetings are currently scheduled for Tuesday, March 9; Thursday, March 18; Thursday, March 25; and Friday, April 2.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-111

In re Applications of

DEAS COMMUNICATIONS, INC. File No. BPH-910208MB

HEALDSBURG BROADCASTING, INC. File No. BPH-910211MB

HEALDSBURG EMPIRE CORPORATION File No. BPH-910212MM

For Construction Permit for a
New FM Station on Channel 240A
in Healdsburg, California

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 1993; Released: March 2, 1993

1. In *Deas Communications, Inc.*, FCC 92M-874, released August 13, 1992 the ALJ dismissed Healdsburg Broadcasting, Inc.'s (HBI) application. HBI's application was subsequently reinstated by the Review Board. *Deas Communications, Inc.*, 7 FCC Rcd 6757 (Rev. Bd. 1992). Deas Communications, Inc. (Deas) filed an Application for Review or, Alternatively Motion for Extraordinary Relief, on October 13, 1992[1] and a Request for Expedited Consideration of Appeal or, Alternatively Motion for Stay on November 6, 1992.[2] While the application for review was pending, the ALJ approved an agreement providing for a partial settlement of the proceeding, the merger of Deas and HBI, and the dismissal of HBI's application. *Deas Communications, Inc.*, FCC 93M-29, released January 21, 1993. On January 12, 1993, the Mass Media Bureau filed a Contingent Motion to Vacate Decision.[3]

2. In view of the merger and the dismissal of HBI's application, HBI is no longer a party to this proceeding, Deas' requests for relief may be dismissed, and the Review Board decision, 7 FCC Rcd 6757, may be vacated in accordance with customary practice. *RKO General, Inc.*, 4 FCC Rcd 4089, 4091 (1989).

3. ACCORDINGLY IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.251(f) that the Contingent Motion to Vacate Decision, filed January 12, 1993 by the Mass Media Bureau IS GRANTED and the Review Board's order, *Deas Communications, Inc.*, 7 FCC Rcd 6757 (Rev. Bd. 1992) IS VACATED as moot.

4. IT IS FURTHER ORDERED That the Application for Review or, Alternatively Motion for Extraordinary Relief filed October 13, 1992 by Deas Communications, Inc., and that the Request for Expedited Consideration of Appeal or, Alternatively, Motion for Stay, filed November 6, 1992 by Deas Communications, Inc. ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Renee L. Licht
Acting General Counsel

By John I. Riffer
Associate General Counsel

[1] Comments in Support were filed October 27, 1992 by the Bureau, and an Opposition was filed October 28, 1992 by Healdsburg Broadcasting, Inc.

[2] Comments were filed November 13, 1992 by the Bureau and by Healdsburg Empire Corporation, and an Opposition was filed November 19, 1992 by Healdsburg Broadcasting, Inc.

[3] The Bureau's motion was contingent on the ALJ's approval of the settlement agreement. Comments in Support of the Bureau's Motion were filed February 5, 1993 by Deas.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-264

In the Matter of

Implementation of Sections 11
and 13 of the Cable Television
Consumer Protection and Competition
Act of 1992

Horizontal and Vertical Ownership
Limits, Cross-Ownership Limitations
and Anti-trafficking Provisions.

ORDER

Adopted: February 26, 1993; Released: February 26, 1993

Comment Date: February 9, 1993
Reply Comment Date: May 12, 1993

By the Chief, Mass Media Bureau:

1. Turner Broadcasting System, Inc. ("TBS"), by its attorneys, and Consumer Federation of America each filed motions requesting an extension of time for submission of reply comments in the above referenced proceeding. TBS requests such an extension until after the Commission has adopted rules implementing the Section 19 program access provisions and the Section 9 leased access provisions of the Cable Consumer Protection and Competition Act of 1992 ("1992 Act").[1] Pursuant to the 1992 Act, the Commission must adopt Program Access and Leased Access rules by April 5, 1993.

2. TBS submits that such an extension is necessary because the outcome of the Program Access and Leased Access Proceedings "will directly affect the views of interested parties with respect to the appropriate horizontal and vertical limits to be imposed pursuant to Sections 11 and 13."[2] TBS also notes that the grant of such an extension will not contravene congressional intent, since the 1992 Act contemplates the adoption of horizontal and vertical ownership limits by October 5, 1993.

3. In the *Notice of Proposed Rule Making and Notice of Inquiry*, MM Docket No. 92-264, released December 28, 1992, in this proceeding, the Commission recognized that the structural restraints of the vertical and horizontal ownership limits must be considered in conjunction with the behavioral restrictions adopted in the Program Access and Leased Access Proceedings. Therefore, we agree that it is appropriate to allow commenters additional time to address the vertical and horizontal ownership limits after the Commission has promulgated Program Access and Leased Access regulations. However, since other issues in this proceeding such as the interpretation and implementation of the anti-trafficking and cross-ownership restrictions are unrelated to the Program Access and Leased Access Proceedings, we decline to extend the date for reply comments on all issues contained in this proceeding. Instead, we will leave the record open for reply comments addressing the establishment of vertical and horizontal ownership limits until May 12, 1993. This should provide interested parties adequate time to review and consider the implication of the Program Access and Leased Access rules on the establishment of vertical and horizontal ownership limits.

4. Accordingly, IT IS ORDERED that the Motions for Extension of Time filed by Turner Broadcasting Systems, Inc. and Consumer Federation of America ARE GRANTED and the time for filing reply comments on the issues of vertical and horizontal ownership limits is extended until May 12, 1993.

5. This action is taken pursuant to authority granted in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and delegated in Sections 0.204 (b) and 0.283 and 1.46 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

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[1] *See Notice of Proposed Rulemaking In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket No. 92-265, released December 24, 1992 ("Program Access Proceeding"); *Notice of Proposed Rulemaking In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation*, MM Docket No. 92-266, released December 24, 1992 ("Leased Access Proceeding").

[2] TBS Comments at 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Expanded Interconnection with Local Telephone Company Facilities	**CC Docket No. 92-141** Transport Phase II
Transport Rate Structure and Pricing	**CC Docket No. 91-213**

ORDER

Adopted: February 25, 1993; Released: February 25, 1993

Transport Rate Structure and Pricing (CC Docket No. 91-213)

Reply Date: March 19, 1993

Expanded Interconnection-Transport-Phase II (CC Docket No. 91-141),

Comment Date: April 2, 1993
Reply Date: April 30, 1993

By the Chief, Policy and Program Planning Division, Common Carrier Bureau:

1. The Competitive Telecommunications Association (CompTel) has requested that the pleading cycles in the above-captioned proceedings be modified.[1] CompTel requests an extension of the comment dates in the *Transport Rate Structure and Pricing* proceeding[2] and in Phase II of the *Expanded Interconnection* proceeding.[3] Under CompTel's request, comments in Phase II of the *Expanded Interconnection* proceeding would be due on March 24, 1993, and replies would be due on April 23, 1993; and reply comments in the *Transport* proceeding would be due on April 9, 1993.

2. In support of its request, CompTel states that both proceedings have been saturated with numerous, lengthy, and sometimes complex pleadings. CompTel notes that pleading cycles for comments on petitions for reconsideration did not close until this week, and that parties have filed various petitions for waivers resulting in additional pleading cycles. Beyond that, CompTel points out that numerous local exchange carriers filed collocation tariffs, petitions for exemption, and density zone pricing plans on February 16, 1993. CompTel requests that the Commission grant parties additional time to review and analyze the materials that have already been filed before preparing the further submissions currently scheduled for filing in early March. CompTel argues that a modest extension will ensure that the pleadings are more comprehensive and responsive on the issues in dispute. CompTel submits that the short extension requested should not delay the staff's development of recommendations or the Commission's decisionmaking timetable in either proceeding. WilTel, Inc. Sprint Communications Co., and MFS Communications Company, Inc. support CompTel's motion.[4]

3. We do not routinely grant extensions of time[5] We intended to ease the burden on the parties with our earlier modification of the pleading schedules in these proceedings. We did not, however, foresee the additional pleadings filed due to parties' petitions for waivers in the *Expanded Interconnection* proceeding, nor the relatively late schedules for comments on petitions for reconsideration in both proceedings. Accordingly, we conclude that CompTel has shown good cause for a limited extension of time. CompTel's proposed reply date for the *Transport* proceeding, however, would result in undue delay. Instead, we restructure the pleading cycle in a manner that ensures that both the *Expanded Interconnection* and *Transport* proceedings move forward in a timely manner.

4. We therefore adopt the following schedule:

March 19, 1993:	Reply comments on Transport Rate Structure and Pricing (CC Docket No. 91-213)
April 2, 1993:	Comments on Expanded Interconnection -- Competitive Switched Access Networks (Phase II) (CC Docket No. 91-141)
April 30, 1993:	Reply comments on Expanded Interconnection -- Competitive Switched Access Networks (Phase II) (CC Docket No. 91-141)

5. Accordingly, IT IS ORDERED that CompTel's Motion for Modification of Schedule IS GRANTED to the extent provided herein, and otherwise IS DENIED.[6]

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[1] Motion for Modification of Schedule by the Competitive Telecommunications Association (Feb. 19, 1993).

[2] *Transport Rate Structure and Pricing*, Report and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd 7006 (1992). Reply comments are due on March 9, 1993. *Expanded Interconnection with Local Telephone Company Facilities, et al.*, Order Restructuring Pleading Cycles, CC Docket Nos. 91-141, 91-213, 92-222, and 80-286, 7 FCC Rcd 7936 (Com. Car. Bur. 1992).

[3] *Expanded Interconnection with Local Telephone Company Facilities*, Second Notice of Proposed Rulemaking, 7 FCC Rcd 7740, 7747-49, ¶ ¶ 40-53 (1992). Replies on Phase II are due on April 2, 1993. *Expanded Interconnection with Local Telephone Company Facilities, et al.*, Order Restructuring Pleading Cycles, CC Docket Nos. 91-141, 91-213, 92-222, and 80-286, 7 FCC Rcd 7936 (Com. Car. Bur. 1992).

[4] Comments in Support of Motion for Modification of Schedule filed by WilTel, Inc. (Feb. 22, 1993) (arguing that an even longer extension would be appropriate to permit parties to confer with one another and try to develop consensus on issues); Comments in Support of Motion for Modification of Schedule filed by Sprint Communications Co. (Feb. 24, 1993); Comments in Support of Motion for Modification of Schedule filed by MFS Communications Company, Inc. (Feb. 24, 1993).

[5] 47 C.F.R. § 1.46(a).

[6] This action is taken pursuant to Sections 4(j) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(j)

FEDERAL COMMUNICATIONS COMMISSION

James D. Schlichting
Chief, Policy and Program Planning
Division, Common Carrier Bureau

and 155(c), and authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 2, 1993

APPLICATION FOR REVIEW OF BUREAU ORDER GRANTING NYNEX WAIVER TO PROVIDE ENTERPRISE SERVICES SOUGHT BY IDCMA AND NYNEX

Pleading Cycle Established

COMMENTS: March 22, 1993
REPLY COMMENTS: April 6, 1993

On February 12, 1993, the Independent Data Communications Manufacturers Association (IDCMA) filed an application for review of the Common Carrier Bureau's order[1] granting NYNEX Telephone Companies (NYNEX) a waiver of Section 64.702(e) of the Commission's Rules. NYNEX filed an application for review of the same order on February 19, 1993.

IDCMA states that the waiver granted by the Bureau permits NYNEX to introduce a new service offering, NYNEX Enterprise Service (NES), which bundles customer-premises equipment (CPE) with regulated transmission service. IDCMA contends that the Bureau order is inconsistent with the Commission's policy that communications common carriers' provision of CPE shall be separate and distinct from the provision of regulated communications service, and that the CPE must be provided on an unbundled and detariffed basis.

NYNEX challenges the Bureau's conclusion that the so-called "multiplexer exception" to the Commission's anti-bundling rule does not permit NYNEX to deploy multiplexers on customer premises on a regulated basis as contemplated by NES. If the Bureau order is allowed to stand, technological advancements of the past five years will be not be fully utilized, deployment of fiber will be curtailed, and carriers will be relegated to the use of costly and out-moded methods of provisioning and maintaining service to customers. It also argues that the waiver granted by the Bureau is unreasonably limited.

Notwithstanding that the IDCMA and NYNEX applications for review were filed on different days, interested parties should file comments regarding these applications no later than March 22, 1993. Reply comments may be filed no later than April 6, 1993.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Ann Stevens, Tariff Division, Common Carrier Bureau, (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

[1] NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 127, DA 93-60 (rel. Jan. 21, 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-382

In re Applications of

EVELYN RAY ROGERS and MORRIS A. ROGERS d/b/a THE DUNLIN GROUP — File No. BPH-880629MC

SEASIDE WIRELESS, LTD., L.P. — File No. BPH-880701MF

H.H. & L., INC., d/b/a H.H. & L COMMUNICATIONS — File No. BPH-880701MM

For Construction Permit for a New FM Station on Channel 280A in Seaside, California

ORDER

Adopted: March 2, 1993; Released: March 11, 1993

By the Review Board: MARINO (Chairman) and GREENE. Board Member ESBENSEN absent.

1. The Review Board has before it for consideration the appeals filed August 3 and August 24, 1992, and the petition for extraordinary review, filed August 24, 1992, by Seaside Wireless, Ltd., L.P. (Seaside).

2. In a Summary Decision (S.D.), FCC 93D-01, released January 14, 1993, Administrative Law Judge (ALJ) Richard L. Sippel resolved favorably basic qualifying issues pertaining to the application of Evelyn Ray Rogers and Morris A. Rogers d/b/a The Dunlin Group, and approved a joint settlement agreement pursuant to which The Dunlin Group's application was granted, and the applications of Seaside and H.H. & L Communications were dismissed. Thirty days have elapsed since the ALJ's action and no party has appealed the S.D. by filing exceptions with the Board. *See* 47 C.F.R. 1.276(a)(1); 1.251(e).[1]

3. ACCORDINGLY, IT IS ORDERED, That the appeals filed August 3 and August 24, 1992, and the petition for extraordinary review, filed August 24, 1992, by Seaside Wireless, Ltd., L.P. ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

[1] There is an unresolved Notice of Forfeiture which the ALJ designated against Seaside. In accordance with 47 C.F.R. 1.80(g)(3), the ALJ forwarded the forfeiture issue to the Commission's Office of General Counsel for appropriate action. *See* S.D., at para. 20.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-166

PUBLIC NOTICE

Released: March 4, 1993

MSS ABOVE 1 GHZ NEGOTIATED RULEMAKING COMMITTEE

AGENCY: Federal Communications Commission

ACTION: Notice of public meetings.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92-463, as amended, this notice advises interested persons of additional meetings of the MSS Above 1 GHz Negotiated Rulemaking Committee ("Committee").

DATES: Wednesday, March 24, 1993 at 9:30 a.m.
Tuesday, March 30, 1993 at 9:30 a.m.
Wednesday, March 31, 1993 at 9:30 a.m.
Friday, April 2, 1993 at 9:30 a.m.
Monday, April 5, 1993 at 9:30 a.m.

ADDRESSES: The meetings scheduled on March 24 and 30 and April 2 and 5 will be held at the Federal Communications Commission, Rm. 856, 1919 M Street, N.W., Washington, D.C. 20554. The meeting scheduled for March 31 will be held at 1330 Connecticut Avenue, N.W., Concourse Level Conference Room, Washington, D.C.

FOR ADDITIONAL INFORMATION CONTACT: Kathleen Campbell, Administrative Assistant to the Committee, at (202) 634-1952.

SUPPLEMENTARY INFORMATION: The agenda for each meeting of the MSS Above 1 GHz Negotiated Rulemaking Committee is as follows:

1. Opening Remarks/Comments
2. Adoption of Agenda
3. Minutes/Records of Previous Meeting
4. Introduction of Documents
5. Informal Working Group Reports
   - Issues
6. Acceptance/Approval of Recommended Rules
7. Acceptance/Approval of Report Text
8. Agenda for future meetings
   - Schedule for future meetings
9. Other Business

Members of the general public may attend this meeting. The Federal Communications Commission will attempt to accommodate as many people as possible. However, admittance will be limited to available seating. There will be no public oral participation, but the public may submit written comments to Fern J. Jarmulnek, the Committee's Designated Federal Officer, before the meeting.

Other meetings of the Committee have previously been announced. (*See* Public Notice, DA 93-163 (58 FR 8927 (February 18, 1993)). All of the meetings begin at 9:30 a.m. The complete schedule of full Committee meetings is as follows:

Day and Date	Location
Tuesday, March 9, 1993	856
Thursday, March 18, 1993	856
Wednesday, March 24, 1993	856
Thursday, March 25, 1993	856
Tuesday, March 30, 1993	856
Wednesday, March 31, 1993	1330 Connecticut Ave, N.W. Concourse Level Conference Room
Friday, April 2, 1993	856
Monday, April 5, 1993	856

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Paging Network of Los Angeles, Inc. File No. 316MS0007

Notice of Apparent Liability for Forfeiture for Station KNKE862 in the Public Land Mobile Service at various locations in California

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 2, 1993; Released: March 4, 1993

By the Commission:

1. Paging Network Inc. (PageNet Inc.) has informed the Commission that it and its subsidiary, Paging Network of Los Angeles, Inc. (PageNet L. A.) (PageNet Inc. and PageNet L. A. hereafter referred to as the Companies), conducted a licensing audit of PageNet L. A.'s facilities and discovered that while the vast majority of facilities were properly licensed, PageNet L. A. had commenced operation of six public land mobile licensed facilities of Station KNKE862 on various frequencies at various locations[1] prior to the filing of the requisite FCC Form 489.[2] PageNet Inc. claims that due to personnel changes, PageNet L. A. did not notify PageNet Inc. that construction was complete and that the station was ready to begin service. PageNet L. A. subsequently filed the FCC Form 489s indicating that it had completed construction of the facilities.

2. In addition, PageNet Inc. simultaneously has informed the Commission that although PageNet L. A. was granted authority on February 5, 1992, to construct and operate one other facility for Station KNKE862 on frequency 931.7875 MHz at Magic Mountain, San Fernando, California, the Companies subsequently discovered that PageNet L. A. had commenced operation of that facility prior to the grant of the construction authorization.[3] PageNet Inc. states that the Companies incorrectly believed that the facility was a 100-percent "fill-in"[4] and, thus, did not require prior authorization but rather "simple notification."[5] PageNet Inc. states that its inadvertent operation has been terminated[6] and that PageNet L. A. will file the required FCC Form 489 before resuming operation.

3. PageNet Inc. states that the Companies and their counsel have undertaken a review of all licensing processes and procedures and that existing deficiencies will be corrected. It also states that the Companies are currently considering additional training for licensing personnel and consolidation of separate data bases to simplify licensing processes.

4. PageNet Inc. contends that although PageNet L. A.'s failure to file the FCC Form 489s, while the result of inadvertent oversight, may be a violation of the Commission's Rules, no forfeiture is warranted for failing to file required forms. It adds that if the Commission deems that a forfeiture is appropriate, the amount should be calculated in accordance with the Commission's *Policy Statement, Standards for Assessing Forfeitures,* 6 FCC Rcd 4695 (1991) (*Policy Statement*), *recon. denied,* 7 FCC Rcd 5339 (1992), *petition for review pendin g sub nom. USTA v. FCC,* No. 92-1321 (D.C. Cir. filed July 30, 1992), which recognizes downward adjustments of forfeiture amounts for: (1) good faith or voluntary disclosure of the existence of a violation, and (2) history of overall compliance with the Commission's Rules. PageNet Inc. references the $5,000 base forfeiture amount under the *Policy Statement*'s "Miscellaneous violations" provision and asserts that downward adjustment factors must be calculated from this figure, should any forfeiture be assessed, because of the Companies' immediate action in disclosing and rectifying the violations.

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[1] The facilities were on the following frequencies at the following California locations: 931.78750 MHz at Palm Springs; 931.18750, 931.31250 MHz, and 931.68750 MHz at Newhall; 931.78750 MHz at El Toro; and 931.78750 MHz at Ranchos Palos Verdes.

[2] Section 22.9(b)(1) of the Commission's Rules states:

> *Notification of status of facilities.* (FCC Form 489). When construction has been completed in accordance with the radio station authorization, the licensee shall so notify the Commission using Form 489. Licensees can commence service the day Form 489 is placed in the mail to the FCC.

[3] Section 301 of the Communications Act provides in relevant part:

> No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio ... except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

Similarly, Section 22.3 of the Commission's Rules states:

> No person shall use or operate any device for the transmission of energy or communications by radio in the services authorized by this part except as provided in this part.

[4] Section 22.16(e) of the Commission's Rules, in relevant part, provides that a "fill-in" application is one in which the reliable service area contour of the proposed transmitter is at least 50-percent encompassed by the reliable service area contour of another non-"fill-in" transmitter on the same frequency.

[5] PageNet Inc. adds that PageNet L. A. began service when it submitted to PageNet Inc. technical data for Schedule B, FCC Form 401, mistakenly believing it was to be filed as part of a FCC Form 489.

[6] In its March 6, 1992 letter to the Commission, PageNet Inc. does not provide the date when operation was terminated.

5. There is no dispute that PageNet L. A. was required to file FCC Form 489s involving the six specified authorizations. Consequently, PageNet L. A. appears to have violated Section 22.9 of the Commission's Rules for failing to file FCC Form 489s. In addition, there is no dispute that, with respect to the facility for Station KNKE862 on frequency 931.7875 MHz at Magic Mountain, San Fernando, California, PageNet L. A. operated a facility without obtaining authorization. Thus, PageNet L. A. appears to have violated Section 301 of the Communications Act and Section 22.3 of the Commission's Rules.

6. Section 503(b) of the Communications Act states, in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
>
> (B) ... willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation or order issued by the Commission under this chapter ... shall be liable to the United States for forfeiture penalty.

We find that PageNet L. A.'s failure to file the FCC Forms 489 for six authorized facilities and PageNet L.A.'s operation of another facility without authorization constitute willful and repeated conduct within the terms of the statute.[7]

7. Pursuant to the *Policy Statement*, the base forfeiture amount for failing to file required forms is $30,000, and the base forfeiture amount for operation at an unauthorized location is $40,000. Consistent with the *Policy Statement*, we are adjusting downward the $30,000 failure-to-file base amount to $6,000 because failing to file an FCC Form 489 is a relatively minor violation[8] and because the failure-to-file violations were voluntarily disclosed. We are adjusting upward the amount, however, to $36,000 because PageNet L.A.'s failure to file was repeated, *i.e.*, it failed to file required forms in six different instances. *Accord, SEG Cellular Limited Partnership*, 7 FCC Rcd 74 (1991), *request for remission or reduction granted in part*, 7 FCC Rcd 5920 (1992), *petition for recon. pending* (filed Oct. 9, 1992) (base forfeiture amount doubled because two locations involving the same violation were present; amount later reduced for history of prior compliance). Moreover, consistent with the *Policy Statement*, we are reducing the $40,000 unauthorized-operation base forfeiture amount to $28,000 because the unauthorized operation was voluntarily disclosed. Because unauthorized operation is a violation of the Communications Act of 1934, it cannot be classified as a minor violation.

8. We are unable to accept PageNet Inc.'s assertion of a history of prior compliance with the Commission's Rules. We point out that another subsidiary of PageNet Inc., namely, Paging Network of Ohio, Inc., recently was issued a Notice of Apparent Liability for Forfeiture consistent with the *Policy Statement* in the amount of $19,000 for repeated "miscellaneous violations" (*i.e.*, filing of FCC Form 489s containing incorrect information). *See Paging Network of Ohio, Inc.*, 7 FCC Rcd 7985 (1992). Consequently, in light of these apparent prior violations, we find that the downward adjustment factor involving history-of-prior-compliance is not warranted in this proceeding. As a result, we are issuing a forfeiture for $64,000 (*i.e.*, $36,000 + $28,000).

9. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, Paging Network of Los Angeles, Inc., IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of sixty four thousand dollars ($64,000) for willful and repeated violations of the aforementioned statutory and rule provisions. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934.

10. Payment of the forfeiture may be made by mailing a check or similar instrument, noting on the payment the File Number of the above captioned proceeding, to the Commission within thirty (30) days of the release date of this Notice, payable to the order of the Federal Communications Commission, to: Federal Communications Commission, P. O. Box 73482, Chicago, Illinois 60673-7482.

11. A copy of this Notice is being sent to Paging Network of Los Angeles, Inc., 4965 Preston Park Blvd., Suite 500, Plano, Texas 75293, by Certified Mail, Return Receipt Requested.

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[7] Section 312(f)(1) of the Communications Act provides:

> The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

This definition applies to Section 503(b) of the Communications Act. *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

Section 312(f)(2) of the Communications Act provides:

> The term "repeated", when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

This definition also applies to Section 503(b) of the Communications Act. *See* H. R. Rep. No. 97-765, 97th Cong. 2nd Sess. 50-51 (1982).

[8] We consistently use the $30,000 base forfeiture amount (and then apply applicable downward adjustment factors) and do not use the $5,000 miscellaneous violations base forfeiture figure, suggested by PageNet Inc., because the *Policy Statement* clearly establishes the specific base amount for failure-to-file-required information violations.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 83-1376

In the Matter of

Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands	RM-4436

ORDER

Adopted: February 26, 1993; Released: March 4, 1993

By the Commission:

1. Pursuant to Section 410(c) of the Communications Act, 47 U.S.C. §410(c), the Honorable James H. Quello is appointed to serve as Chairman of the Federal-State Joint Board in CC Docket No. 83-1376. This Joint Board was established in 1985 to review issues related to the Alaska telecommunications market structure.[1] This appointment fills the position recently vacated by the Honorable Alfred C. Sikes. Henceforth a copy of all filings in this proceeding shall be served on the Honorable James H. Quello at the following address:

The Honorable James H. Quello
Chairman
Federal Communications Commission
Room 802
1919 M Street, N.W.
Washington, D.C. 20554

2. Accordingly, IT IS ORDERED, that the Honorable James H. Quello, pursuant to Section 410(c) of the Communications Act of 1934, 47 U.S.C. §410(c), is appointed to, and shall serve as the Chairman of, the Federal-State Joint Board in CC Docket No. 83-1376.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] Integration of Rates and Services, 50 F.R. 41714 (Oct. 15, 1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-360

In the Matter of

Amendment of Part 32 of
the Commission's Rules to
Implement Statement of
Financial Accounting
Standards No. 96, Accounting
for Income Taxes

FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: March 2, 1993; Released: March 11, 1993

Comment Date: May 3, 1993
Reply Comment Date: May 18, 1993

By the Commission:

I. INTRODUCTION

1. On August 18, 1989, the Commission released a Notice of Proposed Rulemaking (NPRM)[1] that proposed to amend Part 32, Uniform System of Accounts for Telecommunications Companies,[2] to include new accounting practices adopted by the Financial Accounting Standards Board (FASB)[3] in Statement of Financial Accounting Standards No. 96, "Accounting for Income Taxes" (SFAS-96). Subsequent to release of the NPRM, the FASB initiated a project to reconsider SFAS-96 and delayed its mandatory implementation. Because of the possibility of changes in SFAS-96 and the delay in its implementation date, the Commission deferred further action on the NPRM until the FASB completed its reconsideration. In February 1992, the FASB released Statement of Financial Accounting Standards No. 109, "Accounting for Income Taxes" (SFAS-109), which supersedes SFAS-96. SFAS-109 becomes mandatory under generally accepted accounting principles (GAAP) for accounting periods beginning after December 15, 1992.

2. Although SFAS-109 retains major portions of the accounting prescribed in SFAS-96, we believe that the changes SFAS-109 does contain, as well as the changes in the regulatory environment that have occurred since the release of our NPRM, warrant the issuance of a Further Notice of Proposed Rulemaking (Further Notice) before any final action is taken to modify the income tax accounting provisions in Part 32. In this Further Notice we invite comment on modified proposals that incorporate the accounting for income taxes prescribed in SFAS-109. We are also seeking comment on whether the accounts proposed in the NPRM are appropriate and necessary, and on the rate base treatment of the new accounts.

II. BACKGROUND

Summary of NPRM

3. SFAS-96 established new accounting requirements to recognize that temporary differences between the tax basis of an asset or liability and its reported amount in financial statements will result in a future tax liability or a future tax benefit. SFAS-96 requires companies to estimate and record currently the future tax liability or future tax benefit. The NPRM identified major issues related to the implementation of SFAS-96: namely, (1) rate base considerations, (2) accounting for tax liabilities not previously recognized, (3) accounting for the effects of tax rate changes, and (4) accounting for other SFAS-96 changes that affect the determination of deferred tax liabilities. A discussion of these issues follows.

A. Rate Base Treatment

4. The proposed accounting associated with SFAS-96 implementation included the establishment of four new accounts. Several carriers requesting permission to adopt SFAS-96 had indicated that inclusion of these new accounts in the rate base would have no revenue requirement effect. In the NPRM, however, we opted to avoid a revenue requirement effect by proposing to exclude the new accounts from the rate base and net income calculations, citing several advantages to that approach.

B. Tax Liabilities Not Previously Recognized

5. The application of SFAS-96 would require business entities to record significant tax liabilities attributable to the different book and income tax return treatment for specified items that affect their balance sheets.[4] Regulated companies would also record regulatory assets when it is probable that revenues would be provided for recovery of such tax liabilities in the period they are actually paid. To accommodate these provisions of SFAS-96, the NPRM proposed the establishment of a new asset and a new liability account. Account 4341, Net Noncurrent Deferred Tax Liability Adjustments, the proposed liability account, was to be used for recording the estimated tax liability associated with this SFAS-96 requirement. Account 1437, Recoverable Tax Liabilities, the proposed asset account, was to be used for recording the probable future revenues that would extinguish the recorded tax liability.

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[1] Amendment of Part 32 of the Commission's Rules to Implement Statement of Financial Accounting Standards No. 96, Accounting for Income Taxes, 4 FCC Rcd 6447 (1989).

[2] 47 C.F.R. Part 32.

[3] The Financial Accounting Standards Board is the authoritative standard setting body for accounting practices that are used in the American business community.

[4] The tax liabilities required are for temporary differences between book and income tax return requirements for recording income tax associated with capitalized relief and pension costs, allowances for funds used during construction, social security taxes, sales and use taxes, intercompany transactions, and reductions in the tax bases of assets as a result of tax credits.

C. Effects of Tax Rate Changes

6. Under GAAP prior to SFAS-96, a change in the tax rate had no immediate impact on previously recorded, deferred taxes.[5] The effect of tax rate changes was recognized over the life of the timing difference that gave rise to the deferred tax. SFAS-96, however, required immediate recognition of the effect on deferred taxes. Thus, under SFAS-96 accounting, the tax rate reduction from 46 percent to 34 percent under the Tax Reform Act of 1986 (1986 Tax Act)[6] generally resulted in excess deferred taxes on company books since the amounts that would actually become payable on future income tax returns would be less than previously recognized as tax expense for book purposes. Accordingly, in the year of SFAS-96 adoption, nonregulated enterprises were to reduce their deferred tax accounts and to increase income by the amount of the excess.

7. Regulated companies were to treat the excess deferred taxes differently than other companies under SFAS-96 in recognition of special provisions for regulated companies in the 1986 Tax Act. That act specifically protects certain portions of the excess deferred taxes from being recognized as current income and thus returned to ratepayers of regulated telephone companies immediately. Instead, the protected portions must be flowed back ratably over the life of the timing difference that gave rise to the excess. Consistent with SFAS-96, the NPRM proposed to require regulated carriers to reduce their deferred tax balances for all excess amounts, but, in recognition of the provisions of the 1986 Tax Act, the protected portion was to be recorded in a proposed new liability account--Account 4361, Deferred Regulatory Liability, rather than as current income. For the amounts not protected, the NPRM proposed application of SFAS-96 in the same manner as for nonregulated enterprises.

D. Other Considerations Affecting Determination of Deferred Tax Liabilities

8. *Unamortized Investment Tax Credit Balance.* Prior to SFAS-96, the deferral and amortization of investment tax credits (ITCs), as opposed to crediting them to income immediately, did not require an adjustment to deferred income taxes. Under SFAS-96, however, any deferred ITC is viewed as a reduction in the cost of the related asset. This results in a temporary difference between the asset's book basis and its tax basis. Under SFAS-96, this temporary difference would reduce the deferred tax liability. To implement this SFAS-96 requirement, the NPRM proposed to require carriers to record the reduction in tax liability in Account 4341, Net Noncurrent Deferred Tax Liability Adjustments, and to record the amount due to ratepayers in the future in Account 4361, Deferred Regulatory Liability.

9. *Equity Component of Allowance for Funds Used During Construction (AFUDC).* SFAS-96 changed the deferred tax accounting for AFUDC related to plant construction financed with equity funds. Prior to SFAS-96, AFUDC related to equity financing was treated as a permanent difference between book and tax amounts that did not require deferred tax recognition. Under SFAS-96, however, the equity portion of AFUDC was considered a temporary difference between book and tax liability amounts and accounting recognition was required. To implement this provision of SFAS-96, the NPRM proposed to require carriers to record the deferred tax liability by crediting Account 4341, Net Noncurrent Deferred Tax Liability Adjustments, and to record an offsetting amount in Account 1437, Recoverable Tax Liabilities, in recognition of the regulatory treatment that has been given to AFUDC for ratemaking purposes.

10. *Operating Loss and Tax Credit Carryforwards.* The tax law allows some tax benefits that cannot be used to reduce taxes in the current year, such as tax losses and tax credits that exceed deductible limits, to be carried forward to future years. SFAS-96 required carryforwards to be recognized currently as a reduction of deferred tax liability to the extent that temporary differences would have resulted in future taxable income during the allowable carryforward period. If adopted for ratemaking purposes, this treatment could cause a violation of the normalization requirements by reducing the cost of service to ratepayers faster than the tax code permits.[7] To accommodate SFAS-96 and to avoid violating the normalization requirements, the NPRM proposed to require carriers to record the reduction in deferred tax liability from carryforwards by debiting Account 4341, Net Noncurrent Deferred Tax Liability Adjustments, and crediting Account 7251, Deferred Tax Liability Adjustments-Net. These entries were to be reversed when the carryforward amounts were deducted in tax returns.

Summary of Comments on the NPRM

11. The list of respondents to the SFAS-96 proposals is shown in Appendix A. All of the respondents agree with the Commission's intent to incorporate the tax accounting set forth in SFAS-96 into the Part 32 rules on a "revenue neutral basis." However, as discussed in the following paragraphs, the respondents oppose several specific aspects of the NPRM and also suggest technical changes to our proposals.

12. All of the respondents, except Arkansas, oppose our proposal to flow back unprotected excess deferred taxes in the year SFAS-96 was adopted. These parties contend that our proposal in this area would create an inequitable ratemaking treatment that could result in revenue requirement volatility. They also assert that this flowback would be a piecemeal and arbitrary departure from the consistent application of GAAP and would not be revenue neutral. As an alternative to this part of our proposal, several respondents propose that we offset the flow back of unprotected excess deferred taxes against amounts that were previously flowed through, with the remainder to be amortized over a period that is shorter than the average remaining life of the asset that gave rise to the temporary difference. These parties believe that their alternative would avoid a material revenue requirement shift and allow carriers to transition to GAAP at a faster pace.

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[5] Deferred taxes result from the differences in timing between accounting income and taxable income. When tax expense is recognized for accounting purposes but not paid because of timing differences, the deferred taxes balance is increased to recognize the liability for taxes payable in some future period.

[6] Tax Reform Act, Pub. L. No. 99-514, 100 Stat. 2085 (October 22, 1986).

[7] In such circumstances, investment tax credits and the ability to utilize accelerated depreciation for tax purposes could be jeopardized. *See.* I.R.C. §46(f)(2).

13. NYNEX agrees with our proposal to exclude the new tax accounts from rate base consideration, whereas Kiesling states that regulatory assets and liabilities should be included in the rate base. The other respondents favor neither inclusion nor exclusion as long as the accounts for rate base purposes are handled in a symmetrical manner.

14. Bell Atlantic, BellSouth, and USTA state that the effective date for implementing SFAS-96 for regulatory purposes should be the same as the mandatory date for implementation for financial reporting purposes. They believe that a common implementation date would be consistent with our goal of minimizing the differences between regulatory and GAAP financial statements.

15. Several respondents request that we make clear that the adjustments made in implementing SFAS-96 include the effects of state and local taxes.

16. Ameritech, GTE, and USTA oppose our proposal to record the effects of carryforward net operating losses and carryforward investment tax credits expected to reduce future taxes payable in Account 7251, Deferred Tax Liability Adjustments-Net. These parties state that this account should be eliminated and that the effects should be recorded on the balance sheet in Accounts 4341 and 4361. They contend that elimination of Account 7251 would avoid a revenue requirement impact and a possible violation of normalization requirements, which would result from returning investment tax credits to ratepayers faster than ratably.

17. Several parties suggest minor technical changes to our proposed Accounts 1437, 4341, and 4361. They suggest that Account 1437 be renamed Recoverable Regulatory Deferred Charge to more appropriately reflect that this account is an asset rather than a liability account. Parties also suggest that all references to "noncurrent" amounts in Accounts 4341 and 4361 be deleted since these accounts would reflect both current and noncurrent amounts of SFAS-96 adjustments. Moreover, respondents state that references to "prior to January 1, 1989" should be deleted from the Account 4341 description so that the account can accommodate future changes. Finally, parties suggest that we exempt Account 4341 from the vintage year record requirements in Section 32.22 of the Commission's rules.[8] These parties contend that vintage year detail exists in the current accumulated deferred income tax accounts and that it would be unnecessary and unduly burdensome to require the same information in Account 4341.

Changes in SFAS-109 from SFAS-96

18. SFAS-109 made several changes to the accounting requirements prescribed in SFAS-96. The changes contained in SFAS-109 that may affect our policies concern the recognition criteria for deferred tax assets and the classification criteria for determining the current/noncurrent status of deferred taxes. These changes are separately discussed below.

19. SFAS-96 established deferred tax assets only to the extent that they met specific recovery criteria. Furthermore, SFAS-96 did not permit deferred tax assets to be recorded for the tax benefits of operating loss and investment tax credit carryforwards. SFAS-109, on the other hand, establishes deferred tax assets for all deductible temporary differences and operating loss and investment tax credit carryforwards. But it also requires the creation of a valuation allowance that would reduce the deferred tax asset when any portion of the deferred tax asset is deemed nonrecoverable.

20. In SFAS-96, the classification of deferred taxes as current or noncurrent on the balance sheet was based on the timing of the reversal of the temporary difference. Under SFAS-109, however, deferred taxes are classified as current or noncurrent based on the classification of the related asset or liability that gave rise to the temporary difference. If there is no related asset or liability, then the classification is determined by the expected reversal date of the temporary difference.

III. DISCUSSION

Modifications to NPRM

21. Based on the comments received on our NPRM and the changes that have occurred as a result of SFAS-109, we believe that the tentative conclusions we reached in the NPRM are basically sound but may require some modification. The proposed modifications are as follows.

22. With respect to our proposal to flow back unprotected excess deferred taxes in the year of adopting SFAS-109, we tentatively conclude, based on the comments received, that the unprotected deferred taxes and the protected deferred taxes should be accounted for on a consistent basis. Accordingly, we now propose to flow back these unprotected excess deferred taxes over the life of the asset that gave rise to them or over the life of the temporary difference, *i.e.,* the same treatment that is proposed for protected excess deferred taxes.

23. Concerning the recognition of deferred tax assets, we believe that the changes made by SFAS-109 indicate that operating loss and investment tax credit carryforwards should be recorded as deferred tax assets in Account 4361. This change from SFAS-96 also eliminates the need for proposed Account 7251, Deferred Tax Liability Adjustments-Net. With respect to the valuation allowance that SFAS-109 requires for deferred tax assets when they will not be recovered, we do not propose new accounts. Instead, we propose that any valuation allowance be reflected in subsidiary record categories.

24. Regarding the classification of deferred taxes as current or noncurrent, we believe our proposals should incorporate the SFAS-109 changes. Therefore, we propose that deferred taxes be classified as current or noncurrent based on the asset or liability that gave rise to the temporary difference. If there is no related asset or liability, then the classification would be determined by the expected reversal date of the temporary difference.

25. Various respondents suggested several technical changes to the accounts proposed in the NPRM. We have decided to incorporate the following technical changes into our proposals. We propose to delete the reference to "noncurrent" amounts in Accounts 4341 and 4361 since these accounts reflect both current and noncurrent amounts and to change the name of Account 1437 from Recoverable Tax Liabilities to Recoverable Regulatory Deferred Charge to reflect that this account is an asset rather than a liability account. We also propose to delete the reference to "prior

[8] 47 C.F.R. § 32.22.

to January 1, 1989" in Account 4341 so that future income tax rate changes can be accommodated. Furthermore, we propose to exempt Account 4341 from the vintage year requirements of Section 32.22 since this detail is available in other tax accounts. Finally, we propose that the effects of state and local income taxes be covered by our requirements implementing SFAS-109.

26. When the NPRM was issued in 1989, nearly all carriers were still subject to rate of return regulation. Today, most carriers are required to or have opted to follow price cap regulation. Due to the change in regulation at the Federal level and based on the fact that several states have enacted some form of incentive regulation, we seek comment on the relevance of the NPRM in this new regulatory envirionment.

IV. CONCLUSION

27. In this FNPRM we are seeking supplemental and updated comments on the following:

a. Whether we should implement the modified proposals set forth above and as shown in Appendix B.[9]

b. Whether the transition to SFAS-109 should be kept revenue neutral in the current regulatory environment.

c. Whether the proposed accounts should be excluded from rate base consideration.

d. Whether all of the proposed accounts are needed under SFAS-109.

e. Whether there is a need for additional accounts to incorporate SFAS-109 into Part 32.

f. Whether all the proposed accounts or additional accounts are needed for price cap carriers.

g. Whether the effective date for regulatory implementation should coincide with the mandatory effective date for financial reporting purposes.

V. PROCEDURAL MATTERS

28. *Ex Parte Rules - Non-Restricted Proceeding.* This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules.[10]

29. *Regulatory Flexibility Act.* We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act.[11] Carriers providing interstate services affected by the proposed rule amendment generally are large corporations or affiliates of such corporations. The Secretary shall send a copy of this Further Notice of Proposed Rulemaking, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act.[12]

30. *Comment Dates.* Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules,[13] interested parties may file comments on or before **May 3, 1993,** and reply comments on or before **May 18, 1993.** To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D. C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

31. For further information on this proceeding, contact Thad Machcinski in the Accounting Systems Branch, Room 812, 2000 L Street, N.W., Accounting and Audits Division, FCC, Washington, D.C. 20554, (202) 634-1861.

VI. ORDERING CLAUSES

32. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4(i), 201-205, 218, 220, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§151, 154(i), 201-205, 218, 220, 403, NOTICE IS HEREBY GIVEN of the proposed amendments to Part 32 of the Commission's rules, 47 C.F.R. Part 32, described in this Further Notice of Proposed Rulemaking.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

List of Respondents

Comments

Ameritech Operating Companies (Ameritech)

Arkansas Public Service Commission (Arkansas)

Arthur Andersen & Co. (AA)

Bell Atlantic Telephone Companies (Bell Atlantic)

BellSouth Corporation, South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (BellSouth)

Central Telephone Company (Centel)

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[9] Appendix B sets forth the proposed rules.
[10] *See generally* 47 C.F.R. §§ 1.1201, 1.1202, 1.203, 1.1206(a).
[11] 5 U.S.C. § 601(3).
[12] Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).
[13] 47 C.F.R. §§ 1.415, 1.419.

GTE Service Corporation (GTE)

Kiesling Associates (Kiesling)

Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (US West)

New York Telephone Company and New England Telephone and Telegraph Company (NYNEX)

Pacific Bell and Nevada Bell (Pactel)

Southwestern Bell Telephone Company (Southwestern)

United States Telephone Association (USTA)

Reply Comments

Southwestern

USTA

APPENDIX B

Part 32--[Amended]

Part 32, Chapter 1 of the Title 47, Code of Federal Regulations, is proposed to be amended as follows:

1. The authority citation for Part 32 would continue to read as follows:

Authority: Secs. 4(i), 4(j) and 220 as amend; 47 U.S.C. 154(i), 154(j), and 220 unless otherwise noted.

2. Section 32.22 would be amended by revising paragraphs (a), (c), (d) and (f) to read as follows:

Sec. 32.22 Comprehensive interperiod tax allocation

(a) Companies shall apply interperiod tax allocation (tax normalization) to all book/tax temporary differences which would be considered material for published financial report purposes. Furthermore, companies shall also apply interperiod tax allocation if any item or group of similar items when aggregated would yield debit or credit entries which exceed or would exceed 5 percent of the gross deferred income tax expense debits or credits during any calendar year over the life of the temporary difference.

The tax effects of book/tax temporary differences shall be normalized and the deferrals shall be included in the following accounts:

4100 Net Current Deferred Operating Income Taxes

4110 Net Current Deferred Nonoperating Income Taxes

4340 Net Noncurrent Deferred Operating Income Taxes

4350 Net Noncurrent Deferred Nonoperating Income Taxes

* * * * *

(c) Subsidiary records shall be used to reduce the deferred tax assets contained in the above accounts when it is more likely than not (a likelihood of more than 50 percent) that some portion or all of the deferred tax asset will not be realized. The amount recorded in the subsidiary record should be sufficient to reduce the deferred tax asset to the amount that is more likely than not to be realized.

(d) The records supporting the activity in the deferred income tax accounts shall be maintained in sufficient detail to identify the nature of the specific temporary differences giving rise to both the debits and credits to the individuals accounts.

* * * * *

(f) The tax differentials to be normalized as indicated herein shall also encompass the additional effect of state and local income tax changes on Federal income taxes produced by the provision for deferred state and local income taxes for book/tax temporary differences related to such income taxes.

* * * * *

3. Section 32.103 would be amended to add account 32.1437 to the list of accounts to read as follows:

Sec. 32.103 Balance sheet accounts for other than regulated-fixed assets to be maintained:

Balance Sheet Accounts

Account Title	Class A Account	Class B Account
***	***	***
Recoverable Regulatory Deferred Charge	1437	1437
***	***	***

* * * * *

4. Section 32.1437 would be added to read as follows:

Sec. 32.1437 Recoverable Regulatory Deferred Charge.

This account shall include amounts of probable future revenue for the recovery of future increases in taxes payable.

5. Section 32.4000 would be amended to add accounts 32.4341 and 32.4361 to the list of accounts to read as follows:

Sec. 32.4000 Instructions for balance sheet accounts - liabilities and stockholders' equity.

Liabilities and Stockholders' Equity Accounts to be Maintained by Class A and Class B telephone companies:

Balance Sheet Accounts

Account Title	Class A Account	Class B Account
***	***	***
Net Deferred Tax Liability Adjustments	4341	4341
***	***	***
Deferred		

Regulatory Liability	4361	4361
***	***	***

* * * * *

6. Section 32.4100 paragraph (d) would be revised to read as follows:

Sec. 32.4100 Net current deferred operating income taxes.

* * * * *

(d) The classification of deferred income taxes as current or noncurrent shall follow the classification of the asset or liability that gave rise to the deferred income tax. If there is no related asset or liability, classification shall be based on the expected turnaround of the temporary difference.

* * * * *

7. Section 32.4110 paragraph (g) would be revised to read as follows:

Sec. 32.4110 Net current deferred nonoperating income taxes.

* * * * *

(g) The classification of deferred income taxes as current or noncurrent shall follow the classification of the asset or liability that gave rise to deferred income tax. If there is no related asset or liability, classification shall be based on the expected turnaround of the temporary differences.

* * * * *

8. Section 32.4340 paragraphs (a) and (d) would be revised to read as follows:

Sec. 32.4340 Net noncurrent deferred operating income taxes.

(a) This account shall include the balance of income tax expense related to noncurrent items from regulated operations which have been deferred to later periods as a result of comprehensive interperiod tax allocation related to temporary differences that arise from regulated operations.

* * * * *

(d) The classification of deferred income taxes as current or noncurrent shall follow the classification of the asset or liability that gave rise to the deferred income tax. If there is no related asset or liability, classification shall be based on the expected turnaround of the temporary difference.

* * * * *

9. Section 4341 would be added to read as follows:

Sec. 32.4341 Net Deferred Tax Liability Adjustments.

(a) This account shall include the portion of deferred income tax charges and credits pertaining to Accounts 32.1437, Recoverable Regulatory Deferred Charge and 32.4361 Deferred Regulatory Liability.

(b) This account shall be used to record adjustments to the accumulated deferred tax liabilities recorded in Accounts 4100 and 4340 for:

(1) Tax effects of temporary differences accounted for under the flow-through method or treated as permanent differences.

(2) Reclassification attributable to changes in tax rates (Federal state and local).

(3) The tax effects of carryforward net operating losses and carryforward investment tax credits expected to reduce future taxes payable that are reported in published financial statements.

(4) Reversals of the tax effects of carryforward net operating losses and carryforward investment tax credits previously recorded in this account at the time they become recognized as reductions in current taxable income and current taxes payable on tax returns.

(c) This account shall be exempt from the vintage year detail record requirements of Section 32.22(e)(2).

10. Section 32.4350 paragraphs (a) and (g) would be revised to read as follows:

Sec. 32.4350 Net noncurrent deferred nonoperating income taxes.

(a) This account shall include the balance of income tax expense (Federal, state, and local) that has been deferred to later periods as a result of comprehensive interperiod allocation related to nonoperating temporary differences.

* * * * *

(g) The classification of deferred income taxes as current or noncurrent shall follow the classification of the asset or liability that gave rise to the deferred income tax. If there is no related asset or liability, classification shall be based on the expected turnaround of the temporary difference.

* * * * *

11. Section 4361 would be added to read as follows:

Sec. 32.4361 Deferred Regulatory Liability.

This account shall include amounts of probable future revenue reductions attributable to future decreases in taxes payable. As reductions occur, amounts recorded in this account shall be reduced with a debit entry and a credit entry to Account 4341, Net Deferred Tax Liability Adjustments.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
McNulty Broadcasting Corp.

Licensee of Radio Station
KALF-FM, Red Bluff, California

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: February 23, 1993; Released: March 11, 1993

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration: (1) a $10,000 Notice of Apparent Liability (NAL) dated July 22, 1992, and issued July 29, 1992, to McNulty Broadcasting Corp. (McNulty), licensee of Station KALF-FM, Red Bluff, California; and (2) McNulty's response to the NAL, dated September 21, 1992, which it has captioned as a "Petition for Reconsideration" of the NAL.

2. The forfeiture was assessed for the apparent violation of Section 73.1125(a) of the Commission's Rules which requires that a station's main studio be located within its principal community contour. In the case of FM stations, the principal community contour is defined by Section 73.315(a) of the Commission's Rules as the 70 dBu or the 3.16 mV/m contour. KALF's community of license is Red Bluff, California, but McNulty has long desired to locate the main studio for KALF in Chico, California, which lies outside the principal community contour when this contour is predicted under Section 73.315(a) of the Commission's Rules. However, Chico appears to be within the principal community contour when this contour is predicted using Section 73.313 of the Commission's Rules and the National Bureau of Standards Technical Note 101 (NBS Tech Note 101).[1]

3. On May 24, 1990, McNulty filed a letter with the Commission's Audio Services Division seeking verification that the proposed main studio for KALF in Chico would lie within the principal community contour as determined under Section 73.313 of the Commission's Rules and NBS Technical Note 101. In a letter issued in July 1990, the Audio Services Division stated that McNulty's proposed standard for determining KALF's principal community contour was incorrect, and that the main studio would have to remain within the principal community contour as determined under Section 73.315 of the Commission's Rules. In fact, the Audio Services Division's conclusion was incorrect, but McNulty did not challenge this finding at that time.

4. On August 28, 1991, personnel of the Commission's Field Operations Bureau (FOB) inspected KALF's "main studio" in Red Bluff and found "no operating studio." Instead, FOB apparently found only the public inspection file at the purported "main studio" in Red Bluff, and determined that the actual studio in use was in Chico. The Commission's Enforcement Division issued two letters of inquiry to McNulty on September 13, 1991, and March 6, 1992. McNulty's response of March 23, 1992, stated that KALF maintained a main studio in Red Bluff capable of both program production and transmission, and that it had a request pending with the Commission to determine if KALF's "auxiliary studio" in Chico was located within the principal community contour using the standards set forth in Technical Note 101.

5. In an NAL dated July 22, 1992, and released on July 29, 1992, the Mass Media Bureau concluded that KALF had no main studio within its principal community contour and had improperly relocated its main studio to Chico in violation of Section 73.1125(a) of the Commission's Rules.

6. In its response to the NAL, which it captioned as a "Petition for Reconsideration," McNulty asserts that at the time of the FOB inspection, KALF did in fact have a properly equipped main studio in Red Bluff that was capable of being operational. In support of this assertion, McNulty submits photographs of broadcast equipment ostensibly located at the Red Bluff studio, as well as an affidavit from its Chief Operating Officer, Charles Wilkinson, who states that the FOB inspector did not ask for the Red Bluff studio to become operational during the inspection. Furthermore, McNulty asserts that the Commission erred in rejecting the use of Technical Note 101 to determine whether Chico is located within KALF's principal community contour. McNulty documents this assertion concerning Technical Note 101 with copies of letters from the Audio Services Division to other licensees approving the use of this technical standard to demonstrate compliance with Section 73.1125(a) of the Commission's Rules.

7. Although the exact nature of the Red Bluff facility at the time of the FOB inspection is unclear, this issue need not be resolved conclusively since McNulty is correct in asserting that Technical Note 101 may sometimes be used to predict a station's principal community contour. In a Memorandum dated September 30, 1992, the Propagation Analysis Branch of the Commission's Office of Engineering and Technology (OET), using the standards of Technical Note 101, determined that KALF's studio facility in Chico is located within the station's predicted principal community contour and is, thus, in compliance with Section 73.1125(a) of the Commission' Rules. We will, therefore, rescind the Notice of Apparent Liability.

8. Accordingly, IT IS ORDERED, That the forfeiture assessed in the Notice of Apparent Liability issued against McNulty Broadcasting Corp. on July 22, 1992, and released on July 29, 1992, IS RESCINDED.

[1] To the extent that the NAL referred to the NBS Technical Note 101 as a method of measurement, we hereby correct that statement to reflect its actual use as a predictive methodology.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-407

In re Applications of

ELIZABETH M. YOUNTS File No. BPH-870824MH

GREENE BROADCASTING, INC. File No. BPH-870824MI

For a Construction Permit
for a New FM Station on Channel 273A
at Southern Pines, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: March 4, 1993; Released: March 11, 1993

By the Commission:

1. By this action we affirm a Memorandum Opinion and Order, 92M-814 released July 24, 1992, in which the ALJ granted the application filed by Greene Broadcasting, Inc. (Greene) for a new broadcast station at Southern Pines, North Carolina. In an earlier Memorandum Opinion and Order, *Richardson Broadcasting Group,* 7 FCC Rcd 1583 (1982), the Commission had found that Elizabeth Younts was not qualified to be a licensee,[1] it attributed the interests of Greene's limited partners for diversification and integration purposes because they were not properly insulated from involvement in the applicant's affairs, and it remanded the proceeding for further hearings with respect to Richardson Broadcasting Group's (Richardson) financial qualifications.[2] During the remanded proceeding, Richardson requested the dismissal of its application, and the ALJ granted Greene's application.

2. Now before the Commission are an Appeal from the ALJ's ruling, filed August 24, 1992 by Younts,[3] and a Petition for Reconsideration of the Memorandum Opinion and Order remanding this proceeding, filed August 21, 1992 by Greene.[4] Younts argues that Greene's principals were lacking in candor during their testimony in this proceeding and that Greene should be disqualified or the proceeding remanded for further hearings with respect to Greene's qualifications. Greene argues that the Commission erred in awarding only 36 percent credit for its integration proposal.

3. *Greene's Candor:* Younts argues that Dwayne Greene, Greene's sole voting shareholder, lacked candor concerning his hiring of the applicant's engineer and attorney and his involvement in soliciting investors, and that Dwayne Greene and J.D. Longfellow, a non-voting shareholder, gave inconsistent testimony concerning the circumstances surrounding the applicant's negotiations for a new transmitter site. These matters were previously raised in Younts' exceptions to the Initial Decision and were fully considered and rejected by the Commission in the remand order. 7 FCC Rcd at 1588 ¶ ¶ 28-31.

4. Younts is effectively requesting reconsideration of the remand order's determination that she had failed to raise a substantial and material question of fact concerning the candor of Greene's principals. In the instant pleading, Younts has not alleged new or changed facts as required for reconsideration under 47 C.F.R. § 1.106.[5] Moreover, it is well settled that the Commission will not grant reconsideration merely to debate matters on which it has already deliberated and spoken. *WWIZ, Inc.,* 37 FCC 685 (1985) *aff'd sub nom. Lorain Journal Co. v. FCC,* 351 F.2d 824 (D.C. Cir. 1964). Thus, Younts' pleading warrants no further consideration.

5. *Greene's Integration Credit:* Greene argues that the Commission erred in attributing the ownership interests of its limited partners for integration purposes. Greene's arguments were previously considered and rejected by the Commission. 7 FCC Rcd at 1588 ¶ ¶ 32-33. As with Younts, Greene has not alleged new facts or changed circumstances as required for reconsideration by 47 C.F.R. § 1.106 or otherwise made a showing warranting further consideration of its contentions. *WWIZ, Inc., supra.*

6. ACCORDINGLY, IT IS ORDERED, That the Appeal filed August 24, 1992 by Elizabeth M. Younts and the Petition for Reconsideration filed August 21, 1992 by Greene Broadcasting, Inc. ARE DENIED.

7. IT IS FURTHER ORDERED, That the application filed by Elizabeth M. Younts (File No. BPH-870824MH) IS DENIED, and that the application filed by Greene Broadcasting, Inc. (File No. BPH-870824MI) for a construction permit to establish a new FM broadcast station at Southern Pines, North Carolina IS GRANTED.

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[1] Younts has appealed the denial of her application. *Elizabeth M. Younts v. FCC,* Case No. 92-119, filed March 20, 1992 (D.C. Cir.).

[2] In remanding this proceeding, the Commission directed that any exceptions to the ALJ's Supplemental Initial Decision be filed directly with the Commission.

[3] Greene filed an Opposition to Appeal on September 8, 1992; and Younts filed a Reply on September 23, 1992.

[4] Greene sought reconsideration immediately after release of the remand order, but that petition was dismissed as premature. FCC 92I-043 (OGC May 22, 1992). Greene has again filed for reconsideration in order to preserve for court review its objections to the denial of full credit for its integration proposal. Younts filed an Opposition to Greene's instant petition for reconsideration on September 2, 1992.

[5] Nor is there any merit to Younts' associated assertion that the Commission has treated the applicants in a disparate manner, in conflict with *Melody Music, Inc. v. FCC,* 345 F.2d 730 (D.C. Cir. 1965). Younts' own statements showed a pattern of evasiveness and false testimony clearly indicating a willingness to deceive, 7 FCC Rcd at 1583-85 ¶ ¶ 3-9, whereas the evidentiary inconsistencies concerning Greene's proposal, reflecting the varying perceptions of credible witnesses, did not demonstrate intentionally false testimony by Greene's principals. 7 FCC Rcd at 1588 ¶ ¶ 28-31.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-38

In the Matter of

Amendment of the Commission's Rules to Permit Private Carrier Paging Licensees to Provide Service to Individuals	RM-8017

NOTICE OF PROPOSED RULE MAKING

Adopted: February 23, 1993; Released: March 12, 1993

Comment Date: April 12, 1993
Reply Comment Date: April 27, 1993

By the Commission:

I. INTRODUCTION

1. The Commission has before it a Petition for Rule Making filed by the Association for Private Carrier Paging Section of the National Association of Business and Educational Radio, Inc. (NABER) to permit private carrier paging systems to provide paging service to individuals.[1] Comments in support of the petition have been submitted by Paging Network, Inc., PageMart, Inc., PacTel Paging, Inc., and Telocator. We have received no comments in opposition to the petition.

2. After consideration of the NABER petition and related comments, we propose to amend our rules as requested. This proposed rule making would amend Part 90 of the Commission's rules[2] to enable paging licensees at 929-930 MHz and in the Business Radio Service to provide private carrier paging service to individuals as well as other currently eligible users.

II. BACKGROUND

3. Part 90 of our rules currently authorizes private carrier paging (PCP) licensees[3] to offer paging services on a commercial basis, but only to end users who are themselves eligible for licensing under Part 90 and to the federal government.[4] Because Part 90 eligibility is limited to businesses, state and local government agencies, public safety organizations, and other defined entities, private individuals who do not qualify as business licensees are not eligible for a Part 90 license, and therefore are not allowed to obtain paging service from a PCP system. The effect of this rule is to prevent individuals seeking paging service for a non-business purpose from obtaining that service from a private carrier.

4. The Commission first authorized PCP channels in the 929-930 MHz band in 1982.[5] At that time, we envisioned PCP service primarily as a cost-effective means for businesses and government entities to obtain paging service without having to build in-house paging systems. Under the Commission's original rules, therefore, eligibility for PCP service was limited to Part 90 eligibles only. Similarly, our then-existing rules in the Business Radio Service allowed paging licensees to provide service only to other businesses who were themselves eligible for a Business Radio license.

5. In 1989, we initiated a rule making (PR Docket No. 89-45) to enlarge the class of eligible PCP end-users to include both individuals and the federal government.[6] We also proposed to extend the same eligibility rules to PCP systems in the Business Radio Service.[7] In the *Notice*, we pointed out that these proposals were consistent with our 1988 decision to expand user eligibility in the Specialized Mobile Radio (SMR) service.[8] We further noted that Congress had given the Commission broad authority in the Communications Amendments Act of 1982 to expand eligibility in the private radio services to the largest feasible number of users.[9]

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[1] The Petition was filed on June 4, 1992. By Public Notice dated June 23, 1992 (Rep. No. 1897), we requested interested parties to file comments on the Petition within thirty days.

[2] In our recently initiated "refarming" rule making, we have proposed to replace the current Part 90 in its entirety with a new Part 88. *See Notice of Proposed Rule Making*, PR Docket No. 92-235, 7 FCC Rcd 8105 (1992). However, aside from this transposition, the refarming rule making does not propose any change to the rules that are the subject of this proceeding. Should the refarming proposal be adopted prior to a decision in this proceeding, we will amend this proposal to refer to the appropriate sections of Part 88. Otherwise, any changes made to Part 90 as a result of this proceeding will be incorporated into the refarming proposal to the extent it is ultimately adopted.

[3] As used herein, the term "private carrier paging" is intended to encompass PCP service above 900 MHz, governed by Part 90, Subpart P, as well as paging-only channels below 900 MHz in the Business Radio Service, governed by Part 90, Subpart D. Although Subpart D does not refer specifically to "private carrier" paging, licensees under both subparts are authorized to provide commercial paging service to identical categories of eligible users.

[4] 47 C.F.R. §§ 90.75(c), 90.494(a).

[5] *First Report and Order*, Gen. Docket No. 80-183, 89 FCC 2d 1337 (1982); *Second Report and Order*, Gen. Docket No. 80-183, 91 FCC 2d 1214 (1982). Initially, ten of these channels were allotted to PCP service, while thirty were set aside for non-commercial use by Part 90 eligibles to meet their internal paging needs. In 1985, in response to growing demand for private carrier channels, the Commission reallocated the 929-930 MHz channels to make twenty channels available for PCP use, and authorized PCP sharing of the non-commercial channels. *Report and Order*, PR Docket 85-102, 58 RR 2d 1290 (1985).

[6] *Notice of Proposed Rule Making*, Amendment of Part 90 of the Commission's Rules to Expand Eligibility and Shared Use Criteria in the Private Land Mobile Services, PR Docket No. 89-45, 4 FCC Rcd 2589 (1989).

[7] *Id.* at para. 16.

[8] *Id.* at para. 17 (*citing Report and Order*, Amendment of Part 90, Subparts M and S of the Commission's Rules, PR Docket No. 86-404, 3 FCC Rcd 1838 (1988), *aff'd Memorandum Opinion and Order*, 4 FCC Rcd 356 (1988)).

[9] *Id.* at para. 18.

6. We concluded our rule making in January 1991 and issued a *Report and Order* that amended the PCP user eligibility rules to their present form.[10] First, we concluded that PCP systems had the capacity to accommodate additional users on existing channels without any deterioration in service.[11] We further concluded that Part 90 eligibles and the federal government would benefit from having the expanded paging service options that PCP licensees could provide.[12] However, we elected not to extend user eligibility to include individuals. Our reasoning was that at the time there was not a sufficient showing of need for paging services by individuals that could not be satisfied by existing options.[13]

III. DISCUSSION

7. After analysis of the current state of the paging industry and review of NABER's petition and associated comments, we have tentatively concluded that we should revisit our prior decision not to allow individuals to use PCP services. First, the rapid growth in demand for paging services suggests that individual users would benefit from being able to choose between private and common carrier paging alternatives. Second, allowing individual access to PCP services would remove an unnecessary barrier to the ability of PCP systems top compete fully in the paging marketplace. Finally, we see no countervailing benefit to the public from retaining the current rule.

8. The comments in support of the NABER petition uniformly attest to the fact that public demand for paging services is increasing rapidly.[14] As paging technology has become less costly and more widely available, use of pagers has spread well beyond small, specialized groups of users. Increasingly, paging services are being sold on a mass-market basis through large retail distributors, catalogue companies, and similar outlets.[15] According to a recent survey, the number of pagers in service grew by nearly 20 percent in 1991, from approximately 9.9 million to 11.8 million.[16] At this rate of growth, industry analysts project that as many as 20 million units could be in service by the mid-1990s.[17] Moreover, while the majority of paging use is for business purposes, an increasing percentage of individual users are seeking service for private, non-business uses, such as communicating with family members.[18]

9. Given the current rapid expansion of the paging market, it is likely that individual demand for paging services will increase in the future. However, the prohibition against individual use of PCP services forces individuals who want paging service for a non-business purpose to use a common carrier paging operator. While the common carrier option may be satisfactory for many individual users' needs, this restriction arbitrarily deprives the user of the opportunity to compare alternatives. In some instances, PCP operators may be able to provide technically superior service at a lower cost.[19] Similarly, because PCP operators are not subject to common carrier regulation, they may be able to offer specialized service tailored to the user's particular needs.[20] We believe that individual non-business users would benefit from having these options available to them, just as business users do presently.

10. By proposing to allow individuals to choose between private and common carrier paging service, we not only would further our objective of enhancing consumer choices, but also would remove an unnecessary barrier to competition in the paging marketplace. The existing eligibility rules impose a significant burden on PCP licensees, because they require the screening of potential customers to guard against providing service to individuals for a non-business purpose.[21] Such verification is difficult under any circumstances, but this requirement has become particularly problematic as paging systems rely increasingly on mass-market distributors to resell their services to paging customers. The intervening link in the distribution chain requires PCP licensees to impose resale restrictions on their paging units, while at the same time making it difficult for licensees to verify or control who ultimately uses those units or for what purpose.[22]

11. According to comments, the practical result of these limitations has been to constrict the availability of PCP services to the public, including currently eligible users. Because of the resale restrictions involved, some retail outlets and distributors have been reluctant or unwilling to resell PCP services.[23] In addition, the practical difficulty of distinguishing "authorized" from "unauthorized" use by individuals has deterred some PCP licensees from serving any individual customers, including "business individuals" who are eligible under the current rules.[24] We believe that

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[10] *Report and Order*, Amendment of Part 90 of the Commission's Rules to Expand Eligibility and Shared Use Criteria in the Private Land Mobile Services (*"PCP User Eligibility Order"*), PR Docket No. 89-45, 6 FCC Rcd 542 (1991).

[11] *Id.* at para. 10.

[12] *Id.* at paras. 11-14.

[13] *Id.* at para. 15.

[14] *See, e.g.*, NABER Petition at 4-5, PacTel Comments at 4 n.2, PageNet Comments at 5, PageMart Comments at 13.

[15] *See* NABER Petition at 4-5, PageMart Comments at 13-14, PageNet Comments at 7-8, PacTel Comments at 4.

[16] "Analyses of Paging Carriers Indicate Strong Growth by Industry in 1991," *Telocator Bulletin*, May 22, 1992, at 4.

[17] *See* "Survey Shows Paging Growth and Predicts Stable Revenue," *Telocator*, August/September 1992, at 20.

[18] *See* Telocator Comments at 2. PageNet estimates that ten percent of all paging subscribers are non-business users. PageNet Comments at 7.

[19] For example, PageMart claims to have lowered its costs significantly below those of comparable common carriers by switching from terrestrial radio links to transmission of its signal via satellite. PageMart Comments at 12.

[20] *See, e.g.*, PageMart Comments at 11, PageNet Comments at 8.

[21] *See* 47 C.F.R. § 90.403(a) (licensees must exercise "such direction and control as is necessary" to assure that facilities are used only as permitted by the rules).

[22] *See* NABER Petition at 6-7, PageMart Comments at 4-5, PageNet Comments at 5-6.

[23] PageMart Comments at 4-5.

[24] Commenters contend that common carrier paging operators have used the rules to "chill" PCP competition by aggressively challenging the eligibility of individuals who are using PCP services for business purposes. NABER Petition at 7, PageMart Comments at 5-6, PageNet Comments at 10-11. Whether or not this is true, we believe that much uncertainty in interpreting and complying with the rules will be eliminated if user eligibility is based on the identity of the user rather than the purpose for which the service is to be used. As long as the current eligibility rules are in effect, however, we admonish common and private carrier licensees alike not to misapply the rules for anti-competitive purposes.

eliminating the prohibition on individual non-business use would eliminate these problems, thereby making PCP services more widely available.

12. In contrast to the competitive benefits that flow from allowing PCP licensees to serve individuals, we perceive no public interest benefit to retaining the existing rule. In light of current paging technology, which can readily accommodate additional users on existing PCP systems, the rule is not necessary to prevent frequency overuse, degradation of service to existing customers, or similar technological problems. Nor does the distinction between individual and non-individual users (or business and non-business users) serve any other positive purpose that we can perceive. The rule appears to be primarily a carryover from the period when our private land mobile user eligibility rules were considerably more restrictive. Many of these rules have now been eliminated with no detriment to service quality, as in our decision in PR Docket 86-404 to allow SMR systems to serve individuals. We believe the same principles that guided our SMR decision are applicable here and that our paging and SMR user eligibility rules should therefore be made consistent.[25]

13. We also believe that allowing individual use of PCP systems is justified notwithstanding our prior decision not to take this step in PR Docket No. 89-45. In that proceeding, we declined to extend eligibility to individuals primarily because the comments did not demonstrate sufficient need among individuals for private carrier service to justify changing the rule.[26] We believe that the NABER petition and supporting comments have amply demonstrated that such a need now does exist in the paging marketplace. Moreover, we believe that the existing rule is now of such questionable utility that the presumption should be against retaining it unless there is a clear affirmative reason to do so.

IV. CONCLUSION

14. In our view, allowing PCP systems to provide service to individuals would serve the public interest by increasing the alternatives in paging services available to consumers and promoting improved technology and increased efficiency through competition. We seek comments on this proposal and will consider alternatives that are consistent with these goals.

V. PROCEDURAL MATTERS

A. Ex Parte Rules -- Non-restricted Proceeding

15. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

B. Initial Regulatory Flexibility Analysis

16. An Initial Regulatory Flexibility Analysis is contained in Appendix B to this *Notice*.

C. Comment Period

17. Interested persons may file comments on or before **April 12, 1993,** and reply comments on or before **April 27, 1993.** For filing requirements, *see generally* 47 C.F.R. §§ 1.415, 1.419. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting materials. If you want each Commissioner to receive a personal copy of your comments, you must file an original and nine copies. Send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington D.C. 20554. All comments will be available for public inspection during regular business hours in the Dockets Reference Room at the Commission's headquarters at 1919 M Street, N.W., Washington, D.C.

D. Further Information

18. For further information regarding this *Notice,* contact David L. Furth, Private Radio Bureau, Policy and Planning Branch, (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Part 90 of Chapter 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303 and 332, unless otherwise noted.

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[25] While supporting the proposed rule change, Telocator contends that eliminating user eligibility restrictions for PCP systems may "blur" the distinction between private and common carrier paging, and suggests that we undertake a broader inquiry into the differing regulatory treatment of private and common carriers. Telocator Comments at 2-3. We consider such an inquiry unnecessary in the context of the present proceeding. Our proposal is not intended in any way to alter the private carrier status of PCP systems, nor do we believe it will have the "blurring" effect suggested by Telocator. We have previously explored the legal repercussions of expanding private carrier user eligibility in Docket 86-404, in which we concluded that providing service to individuals would not alter the private carrier status of SMRs. *Report and Order,* Amendment of Part 90, Subparts M and S of the Commission's Rules, PR Docket 86-404, 3 FCC Rcd 1838 (1988) at paras. 19-25. This conclusion applies with equal force to our current proposal.

[26] *PCP User Eligibility Order,* PR Docket No. 89-45, 6 FCC Rcd 542 (1991) at para. 15. In fact, most of the comments in the earlier proceeding related to the non-paging portions of our proposal, and relatively few parties commented on the proposed revisions to our paging rules.

* * * * *

2. 47 C.F.R. § 90.75 is amended by revising paragraph (c)(10) to read as follows:

§ 90.75 Business Radio Service

* * *

(c) * * *

(10) This frequency is assigned only for one-way paging communications to mobile receivers. Only A1D, A2D, A3E, F1D, F2D, F3E, or G3E emissions may be authorized. Licensees may provide one-way paging communications on this frequency to individuals, persons eligible for licensing under subpart B, C, D, or E of this part, and representatives of Federal Government agencies.

* * * * *

3. 47 C.F.R. § 90.494 is amended by revising the third subparagraph of paragraph (a) to read as follows:

§ 90.494 One-way paging operations in the 929-930 MHz band.

(a) * * *

Frequencies listed in Pool 2 are available only for shared use by private carrier paging (PCP) licensees in providing one-way paging communications to individuals, persons eligible for licensing under subpart B, C, D, or E of this part, and representatives of Federal Government agencies.

APPENDIX B

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason for Action

The Commission proposes to amend Part 90 of its rules to allow private carrier paging systems to provide service to individuals. This change will extend the benefits of private radio communications service to a greater number of users by providing additional service options, and will also increase spectral efficiency by allowing for competition, which spurs technological innovation. This action is intended to remove unnecessary restrictions on the ability of private radio licensees to provide their services.

Legal Basis

The proposed action is authorized under Sections 4(1), 303(g), 303(r), and 331(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r), and 332(a) (1988).

Reporting, Recordkeeping and Other Compliance Requirements

None.

Federal Rules Which Overlap, Duplicate or Conflict with These Rules

None.

Description, Potential Impact, and Number of Small Entities Involved

Individual paging users would be benefited by this proposal because of the additional options made available to them. Private carrier paging licensees would also benefit from not being required to determine whether customers are using paging services for business or non-business purposes.

Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives

None.

IRFA Comments

We request written public comment on the foregoing Initial Regulatory Flexibility Analysis. Comments must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the deadlines provided in paragraph 17 of this *Notice*.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-23

In the Matter of

Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations — RM-7931

NOTICE OF PROPOSED RULEMAKING

Adopted: February 11, 1993; Released: March 8, 1993

Comment Date: May 12, 1993
Reply Comment Date: May 27, 1993

By the Commission:

I. INTRODUCTION

1. This Notice of Proposed Rulemaking proposes to eliminate the licensing requirement for most international receive-only earth stations in the fixed-satellite service. Our decision to initiate this proceeding is in response to the Communications Satellite Corporation's (Comsat's) petition to repeal the licensing requirement for receive-only earth stations operating with satellites of the International Telecommunications Satellite Corporation (INTELSAT).[1] Comsat's proposal is consistent with the Commission's ongoing effort to eliminate unnecessary regulation and speed processing. We therefore treat Comsat's pleading as a petition for rulemaking, and incorporate it into this broader proceeding to deregulate most international receive-only earth stations in the fixed-satellite service.

II. BACKGROUND

A. Existing Policy

2. Pursuant to Section 25.131(j) of the Commission's Rules, the Commission licenses international receive-only earth stations operating with INTELSAT satellites, international separate system satellites, or U.S. domestic and non-U.S. satellites for reception of fixed-satellite services from other countries.[2] The only receive-only earth stations excepted from this requirement are those used to receive INTELNET I services[3] from INTELSAT satellites.[4]

3. Section 25.131(j) was adopted in 1991 as part of a broader rulemaking in which the Part 25 rules were revised, and the licensing requirement for domestic receive-only earth stations was eliminated in favor of a voluntary registration program.[5] In the *Part 25 Order* proceeding, the Commission was asked by one of nearly eighty commenting parties to deregulate all international receive-only earth stations as well. The Commission declined this invitation because the comments on the record before it were "insufficient to decide whether and under what conditions current licensing requirements may be relaxed consistent with international obligations."[6] However, the Commission indicated that further review of this issue may be desirable in a separate proceeding.[7] We now believe that the time has come to eliminate certain licensing requirements. Therefore, we are initiating this rulemaking and inviting public comments.

B. Comsat's Petition

4. Comsat's petition to repeal Section 25.131(j)(1) states that the underlying concerns expressed in the *Part 25 Order* for retaining the licensing requirement for international receive-only earth stations no longer exist. In that order, we raised questions about U.S. obligations to INTELSAT and Inmarsat. However, Comsat notes that there is no INTELSAT requirement that receive-only earth stations operating with the system be licensed by member administra-

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[1] Communications Satellite Corporation, Petition for Repeal and, in the Interim, for Waiver of Section 25.131(j)(1), filed February 20, 1992. Comsat's petition was the subject of two public notices, one (RM-7931) dealing with Comsat's request for repeal of the rule, and the other (File No. ISP-92-004) dealing with its request for a waiver. The Bureau dismissed without prejudice Comsat's waiver request for failure to demonstrate special circumstances that would make strict application of the rule inconsistent with the purposes of the rule. *Communications Satellite Corporation*, 7 FCC Rcd 4602 (Com. Car. Bur. 1992). Comsat refiled its waiver request (File No. ISP-92-007), narrowing its scope to cover only international receive-only earth stations accessing the INTELSAT K satellite, and providing services similar to INTELNET I. *See infra* note 4. The Bureau granted Comsat's revised wavier request. *Communications Satellite Corporation*, 7 FCC Rcd 6028 (Com. Car. Bur. 1992), *app. for review pending*.

[2] 47 C.F.R. § 25.131(j) (1991).

[3] INTELNET I service involves the one-way transmission of data to a small, stand-alone, receive-only earth station on a customer's premise.

[4] *See Deregulation of Receive-Only Earth Stations Operating with the INTELSAT Global Communications Satellite System, Declaratory Ruling*, RM No. 4845, FCC 86-214 (released May 19, 1986)(*Equatorial*). In addition, the Bureau recently granted a waiver to permit unlicensed operation of international receive-only earth stations accessing the INTELSAT K satellite, to the extent such reception: (1) involves stand-alone, passive devices not an integral part of any common carrier network; (2) involves direct-to-user applications; (3) involves reception of encrypted video and audio transmissions; and (4) does not infringe on any obligations owed to INTELSAT. *See Communications Satellite Corporation*, 7 FCC Rcd 6028 (Com. Car. Bur. 1992), *app. for review pending*.

[5] *Amendment of Part 25 of the Commission's Rules and Regulations to Reduce Alien Carrier Interference between Fixed-Satellites at Reduced Orbital Spacings and to Revise Application Processing Procedures for Satellite Communications Services*, 6 FCC Rcd 2806 (1991) (*Part 25 Order*).

[6] *Part 25 Order* at 2807-08.

[7] *Id.*

tions. Comsat states INTELSAT is only concerned about the potential for harmful interference, which inherently is not a factor with receive-only earth stations. In fact, Comsat observes that a number of countries already permit unlicensed receive-only earth stations to access INTELSAT. In addition, Comsat argues that nothing in the Communications Satellite Act of 1962 (Satellite Act), nor the Communications Act of 1934 (Communications Act) precludes the elimination of the current licensing requirement.

5. Five parties support Comsat's petition to repeal the rule, reiterating Comsat's arguments that the licensing requirement is time-consuming, burdensome, not required by INTELSAT or any U.S. statutes, and no longer appears to serve any useful public interest purpose.[8] Three parties oppose the petition to some degree, arguing Comsat has failed to justify an immediate repeal of Section 25.131(j)(1). However, all of the opposing parties support, in general, the initiation of a rulemaking to address the issues raised by Comsat's petition.[9]

III. DISCUSSION

6. The Commission already has eliminated the licensing requirement for domestic receive-only earth stations in the fixed-satellite service, substituting a voluntary registration program in its place. These changes were prompted by the increasing competition in the satellite industry, the resulting stimulation of new and increased services, and the Commission's desire to prevent the benefits of this competition from being frustrated by delays in authorizing earth station facilities and by imposing unnecessary burdens on applicants.[10] To date, the Commission's experience with deregulation of domestic receive-only earth stations has been positive.

7. However, the Commission has declined to eliminate the licensing requirement for international receive-only earth stations, other than those used to provide INTELNET I service, due to concerns about U.S. obligations to INTELSAT and Inmarsat. Due to changes in the international satellite arena, as confirmed by the record generated by Comsat's petition, we now believe there is no longer a basis for these concerns. We also note that the same factors which prompted us to eliminate the licensing requirements for domestic receive-only earth stations are also prevalent in the international satellite market place. We therefore tentatively conclude that the time has come to remove the licensing requirement for international receive-only earth stations in the fixed-satellite service.

8. *Earth Stations Accessing the INTELSAT System.* INTELSAT is introducing various small antenna services. For instance, the high power and large coverage area of the INTELSAT K satellite permit the downsizing of receive-only earth stations to such small dimensions that it is now economically feasible to transmit international video and audio programming directly to user locations that potentially number in the thousands. Administration of a licensing program for these stations would be burdensome and possibly hinder the rapid introduction of these new services. Therefore, we believe that elimination of the licensing requirement would be in the public interest. In support, Comsat states that the concerns it expressed in our *Equatorial* proceeding concerning across-the-board deregulation of international receive-only earth stations no longer exist.[11] There is no INTELSAT requirement that receive-only earth stations operating with the system be licensed by member administrations. Indeed, it appears a number of foreign countries, including members of the European Community, already permit unlicensed receive-only earth stations to access INTELSAT.[12] Therefore, we believe deregulating international receive-only earth stations would not violate any U.S. obligations to INTELSAT or Inmarsat. In addition, we have already found that International Telecommunications Union (ITU) radio regulations do not require us to license INTELNET I receive-only stations.[13]

9. We also tentatively conclude there is nothing in the Satellite Act or the Communications Act that precludes the elimination of the current licensing requirement. This issue was first addressed in the 1986 *Equatorial* ruling. There, the Commission concluded that receive-only INTELNET I earth stations are not subject to the licensing restrictions of the Satellite Act. Although we found Section 201(c)(7) of the Satellite Act requires licensing of "satellite terminal stations" to Comsat and common carriers, we concluded that INTELNET I receive-only earth stations are not "satellite terminal stations" since they are not connected to the domestic common carrier network and used to provide U.S. common carrier services.[14] Further, we found that earth station licensing is controlled by Title III of the Communications Act, not Section 201(c)(7).[15]

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[8] The parties supporting Comsat's proposal are Scientific-Atlanta, SSE Technologies Inc. (SSE), Andrew Corporation (an informal letter), Brightstar Communications, Ltd. (Brightstar), and IDB Communications Group, Inc. (IDB).

[9] The parties expressing some form of opposition to Comsat's petition are GE American Communications, Inc. (GE American), Pan American Satellite (PanAmSat), and GTE Spacenet Corporation (GTE).

[10] Amendment of Part 25 of the Commission's Rules and Regulations to Reduce Alien Carrier Interference Between Fixed-Satellites at Reduced Orbital Spacings and to Revise Application Processing Procedures for Satellite Communication Services, *Notice of Proposed Rulemaking*, 2 FCC Rcd 762, 767 (1987); *see also* Deregulation of Domestic Receive-Only Satellite Earth Stations, 104 FCC 2d 348 (1986); Regulation of Domestic Receive-Only Satellite Earth Stations, 74 FCC 2d 205 (1979).

[11] As the U.S. Signatory to INTELSAT, Comsat is responsible for ensuring that operators accessing this system comply with the pertinent rules and standards of the INTELSAT organization. In *Equatorial*, Comsat asserted that total deregulation of international receive-only earth stations could be inconsistent with the INTELSAT Agreement, which considers the earth stations used with the global satellite system as part of that system, or with INTELSAT charging policies. *Equatorial*, at p. 5, n.9.

[12] *See* Comsat Petition at p. 4.

[13] *See Equatorial*, at p. 11, para. 17.

[14] In a later proceeding, the Commission further found that an earth station would not be a "satellite terminal station" if it was merely connected to a domestic common carrier; the earth station must also be "operationally connected," (*i.e.* an integral part of the carrier's network), and be used to exchange the carrier's common carrier traffic with the INTELSAT satellite system. *See Licensing Under Title III of Private Transmit/Receive Earth Stations Operating with the Intelsat Global Communications Satellite System*, 3 FCC Rcd 1585, 1586 (1988)(*Reuters*), *aff'd TRT Telecommunications Corp. v. F.C.C.*, 876 F.2d 134 (D.C. Cir. 1989).

[15] *Equatorial* at 10 (¶ ¶ 15-16).

10. The Commission also concluded in *Equatorial* that, since receive-only earth stations are "passive device[s]," they "do not raise the regulatory concerns that [Title III] licensing was intended to control, "*i.e.*, the conservation of spectrum and the prevention of harmful interference.[16] Finally, the Commission determined that Section 705 of the Communications Act, 47 U.S.C. § 605, gave it ample authority to meet its obligation under the ITU Radio Regulations to prevent the unauthorized reception of radio signals.[17] For all these reasons, the Commission concluded that it could, and should, deregulate INTELNET I receive-only earth stations.

11. Although the *Equatorial* ruling was limited to INTELNET I earth stations, we believe the same reasoning applies with respect to most other receive-only earth stations accessing INTELSAT. These stations also are "passive devices" that do not cause problems with respect to spectrum conservation or harmful interference. Further, Section 705 of the Communications Act is just as applicable to other types of international receive-only earth stations as it isto INTELNET I earth stations. Finally, such earth stations generally are not an integral part of any domestic common carrier system (and, thus, are not subject to Section 201(c)(7) of the Satellite Act). Accordingly, we tentatively conclude that there is no legal impediment preventing adoption of a non-licensing approach for international receive-only earth stations operating with INTELSAT, other than those operationally connected to a domestic common carrier system. However, for those receive-only earth stations which are operationally connected with a domestic common carrier system and used to exchange the carrier's common carrier traffic with the INTELSAT satellite system, we tentatively conclude that Section 201(c)(7) of the Satellite Act precludes us from totally deregulating them, and that these stations would still be required to obtain appropriate authorization. We request comment on these tentative conclusions.

12. There are also compelling policy reasons to deregulate international receive-only earth stations operating with the INTELSAT system. As INTELSAT's service capabilities have developed (for example, with the high-powered INTELSAT K), new opportunities have arisen for Comsat's customers to access the INTELSAT system using receive-only earth stations. It would be unreasonable to expect U.S. customers to undergo the burdensome process of individually licensing receive-only earth stations for use with the INTELSAT system when such licensing serves no legitimate purpose. Moreover, the administration of such a licensing program would place unnecessary strain on the Commission's already scarce resources. Modifying Section 25.131(j) would thus further Commission policies and serve the public interest by increasing service options, reducing customer cost, promoting the rapid introduction of service and freeing up Commission resources for other purposes. This proposal would also eliminate unnecessary regulations that impair growth and burden the U.S. economy.

13. *Earth Stations Accessing Non-INTELSAT Satellites.* IDB and PanAmSat propose that we deregulate receive-only earth stations operating with non-INTELSAT satellites as well. We agree with this proposal to the extent noted below. Most of the reasons stated above for deregulating receive-only earth stations operating with INTELSAT satellites also apply to those stations operating with non-INTELSAT satellites. These earth stations do not require licensing under Title III, and Section 705 of the Communications Act gives this Commission the authority to prevent unauthorized reception of radio signals if necessary. Comsat also supports deregulation of these earth stations. The only difference between deregulating these earth stations versus INTELSAT receive-only earth stations, is that the United States is obligated under Article XIV(d) of the INTELSAT Agreement to engage in technical and economic consultations with INTELSAT before we authorize space segment facilities separate from INTELSAT to be used to satisfy international telecommunications services requirements.[18] Therefore, deregulated receive-only earth stations may only be operated with non-INTELSAT satellites for which the United States has completed the consultation process with INTELSAT. Operation of receive-only earth stations with non-consulted space stations will not be permitted. However, operators may request the Commission to initiate consultation for such space stations and the Commission will issue a public notice if and when such consultation is completed. We request comment on this approach and invite any alternative proposals to ensure satisfaction of U.S. obligations. In addition, GTE has raised a question as to whether deregulation is appropriate for receive-only earth stations used to provide transborder services. We tentatively conclude that it is and request comment on this.

14. *Registration.* IDB submits that international receive-only earth stations should be eligible for registration for operations where fixed-satellite service downlinks share frequency bands with other services (*e.g.*, C-band and a portion of the international Ku-band). IDB states this voluntary registration would afford the same protection from interference as a license.

15. We propose to establish a streamlined registration program, similar to that used for domestic receive-only earth stations.[19] We are not convinced, however, that the exact registration program used for domestic receive-only earth stations would be the least burdensome method of affording interference protection to those that desire it in

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[16] *Id.* at 10-11 (¶ 16).

[17] *Id.* at 11-12 (¶ 17).

[18] We note that INTELSAT recently relaxed its procedures for economic harm assessment of separate systems: (1) no economic harm assessment will be required for separate systems providing services not connected to the public switched network (PSN); and (2) a presumption of no economic harm will be made for systems carrying no more than 1250 64 kbs circuits per satellite connected with the PSN. *See* INTELSAT 18th Assembly of Parties, Record of Decisions, November 3-6, 1992. It appears INTELSAT is moving towards eventual elimination of the consultation requirement, which action would significantly alleviate our concerns about satisfying U.S. obligations under Article XIV(d) of the INTELSAT Agreement.

[19] However, we do not propose allowing the registration of mobile receive-only earth stations. Because these stations are operated while moving, and not from fixed locations, the normal frequency coordination process used for fixed stations would not work. Further, the Commission has not established a channelization plan for these stations to prevent interference, such as is used for cellular systems. Therefore, we do not believe frequency protection can be afforded these stations, making the registration process inapplicable.

this context. Therefore, we propose the following modified registration program. Applicants desiring registration would first complete frequency coordination, then submit an application to the Commission on FCC Form 493 with the appropriate fee ($230), and a certification that coordination had been completed. The Commission would assign the application a file number, place it on public notice as accepted for filing, and the station would be automatically authorized 30 days after notice if no objections are received. A public notice would be issued confirming the grant. If an objection is received within 30 days, the application would not be automatically granted, and would be subject to further public notices informing the public of its status. Further, we propose not to assign call signs; instead the file number will be the sole reference to the station. We also propose a ten year registration period with an option for renewal. Finally, we propose that applications need not be filed for assignments, transfers or modifications to a registration, which is not a license under Title III. The Commission should be notified simply by letter of any changes to the registration, including cessation of operations. We invite comments on this proposal.

16. We also invite commenters to propose alternative methods of giving receive-only earth station owners interference protection. We recognize that our public notices identifying those desiring interference protection are essential to frequency coordinators in order to update their databases. Therefore, proposals should take this into account.[20]

17. *Scope of Deregulation.* We also propose that, apart from the exception noted above for earth stations accessing INTELSAT that are operationally connected to a domestic common carrier system, our deregulation of international receive-only earth stations apply across the board to all such stations operating in the fixed-satellite service, whether these earth stations are used at fixed locations, or used in motion on aircraft or any other transportable platform. We do not believe there are any legal impediments to such a broad deregulation, and such deregulation would promote the most flexibility in the use of the frequency band and will not detract from its primary use. We invite comments on these proposals.

IV. CONCLUSION

18. In this *Notice,* we tentatively conclude that the public interest requires that we remove the licensing requirement of Section 25.131(j) for most international receive-only earth stations in the fixed-satellite service. Therefore, we propose to amend Section 25.131(j) to remove the licensing requirement for all international receive-only earth stations in the fixed-satellite service, except those that are "satellite terminal stations" (*i.e.* operationally connected with a domestic common carrier system and used to exchange the carrier's common carrier traffic with the INTELSAT satellite system), which stations are governed by Section 201(c)(7) of the Satellite Act.[21] Further, we propose to establish a voluntary registration process for those international receive-only earth stations which require frequency protection, although we request comment on alternative methods. We request comments on the issues and proposals addressed in this *Notice* and encourage full participation of domestic and international satellite and earth station operators and users.

19. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix A, Section II. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice (*see* Appendix A, Section III), but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1980).

V. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED that NOTICE IS HEREBY GIVEN of the proposed regulatory action described above, and that COMMENT IS SOUGHT on the proposals in this *Notice* and in Appendix B.

21. This action is taken pursuant to Sections 4 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303(r), and Section 201(c) of the Communications Satellite Act of 1962, 47 U.S.C. § 721(c).

22. For further information on this *Notice* contact Michael J. Pollak, Senior Engineer, Common Carrier Bureau, (202) 632-7834 and Troy F. Tanner, Attorney, Common Carrier Bureau, (202) 632-7265.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[20] We also note regarding international frequency coordination, the Commission has another rulemaking at this time which deals with registration with the International Frequency Registration Board (IFRB). *Notice of Proposed Rulemaking,* 7 FCC Rcd 5066 (1992). Comments addressing international frequency protection should also take into consideration the actions proposed in that proceeding.

[21] Removal of the licensing requirement does not affect other potential constraints that may be imposed by U.S. law. For example, in addition to the requirements of consultation imposed by the INTELSAT Agreement, there may be other constraints imposed such as copyright laws.

APPENDIX A

Procedural Matters

I. Ex Parte Rules - Non-Restricted Proceeding

This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

II. Initial Regulatory Flexibility Act

A. Reason for Action

This rulemaking proceeding is initiated to obtain comment regarding proposed elimination of the Commission's licensing requirement for most international receive-only earth stations in the fixed-satellite service.

B. Objectives

The Commission seeks to remove unnecessary regulations, and thereby stimulate growth in the international satellite market.

C. Legal Basis

The proposed action is authorized under Sections 4 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303(r), and Section 201 of the Communications Satellite Act of 1962, 47 U.S.C. § 721.

D. Reporting, Recordkeeping and Other Compliance Requirements

The proposed registration program is voluntary, and less burdensome than the current licensing procedures. Therefore, the new reporting or recordkeeping requirements of the proposed rules will not create additional burdens on the public.

E. Federal Rules That Overlap, Duplicate or Conflict With These Rules

None.

F. Description, Potential Impact, and Number of Small Entities Involved

The proposals discussed in this *Notice of Proposed Rulemaking* primarily will reduce regulatory requirements on the small businesses and the public at large who utilize receive-only earth stations for their own use. The licensing requirement will remain the same for those earth station owners that plan on operationally connecting their earth stations with a domestic common carrier network and using it to exchange the carrier's common carrier traffic with the INTELSAT satellite system.

G. Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives

The *Notice* solicits comment on a variety of alternatives to achieve Commission objectives.

III. Comment Dates

Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before May 12, 1993 and reply comments on or before May 27, 1993. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to: Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M St., N.W., Washington, D.C. 20554.

APPENDIX B

Proposed Amendment to Rule

Part 25 of the Commission's Rules and Regulations (Chapter I of Title 47 of the Code of Federal Regulations) is proposed to be amended to read as follows:

1. The authority citation for Part 25 continues to read:

AUTHORITY: Sections 101-404, 76 Stat. 419-427; 47 U.S.C. 701-744, Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interprets or applies sec. 303, 48 Stat. 1082, as amended; 47 U.S.C. 303.

2. Section 25.131 is amended by revising paragraphs (b), (i), (j), and (k) as follows:

(b) Except as provided in paragraph (j) and (k) of this section, receive-only earth stations in the international and domestic fixed-satellite service may be registered with the Commission in order to protect them from interference from terrestrial microwave stations in bands shared coequally with the fixed service in accordance with the procedures of §§ 25.203 and 25.251-25.256.

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(i) Applications for modification of license or registration of receive-only earth stations shall be made in conformance with § 25.117 of this part, except that the owner/operator shall notify the Commission by letter of modifications to registrations for international receive-only earth stations which do not require new frequency coordination. Both Domestic and International Registrants are required to notify the Commission when a receive-only earth station is no longer operational or when it has not been used to provide any service during any 6 month period.

(j) Receive-only earth stations operating with INTELSAT space stations for reception of services from other countries do not need to be licensed, except for receive-only earth stations operationally connected with a domestic common carrier and used to exchange the carrier's common carrier

traffic with the INTELSAT satellite system, which stations do require licenses. Applications for license shall be filed on FCC Form 493.

(k) Receive-only earth stations operating with international space stations or U.S. domestic and non-U.S. space stations for reception of services from other countries do not need to be licensed but are permitted to operate only with space stations for which that the United States has completed the consultation process with INTELSAT. Operation of receive-only earth stations with non-consulted space stations is not permitted. Operators may request the Commission to initiate consultation for such space stations and the Commission will issue a public notice if and when such consultation is completed.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-352

In re Applications of

Ronald E. Patterson & Cal E. Varner d/b/a CAPITOL CITY BROADCASTING COMPANY — File No. BPH-880812MZ

MATTHEW WILLIAMS — File No. BPH-880816OC

For Construction Permit for
New FM Station on Channel 247C2,
Longview, Texas

Appearances

Donald E. Martin and *Spencer W. Weisbroth* on behalf of Capitol City Broadcasting Company; *Lawrence Bernstein* and *F. Joseph Brinig* on behalf of Matthew Williams.

DECISION

Adopted: February 26, 1993; Released: March 11, 1993

By the Review Board: MARINO (Chairman) and GREENE. Board Member BLUMENTHAL concurring with Statement.

Board Member GREENE:

1. The Review Board has before it the *Initial Decision* of Administrative Law Judge Edward J. Kuhlmann, 7 FCC Rcd 1938 (1992), which disqualified Matthew Williams and granted the application of Capitol City Broadcasting Company for a new FM station in Longview, Texas. Williams has excepted to this decision, sought a remand to try basic qualifying issues against Capitol, and moved to dismiss Capitol's application.[1] Capitol has opposed these exceptions and motions and petitioned to dismiss Williams' exceptions. After carefully reviewing the pleadings and record before it, the Board is affirming the ALJ in his disqualification of Williams and is granting the application of Capitol without further hearing.

2. Two of the seven applications initially designated for hearing in this proceeding remain. The ALJ added potentially disqualifying issues against Williams concerning his candor about his interest in Blue Jay Productions, Inc., and Blue Jay's broadcast interests and about whether Williams' father, Bruce Williams, is a real party in interest in the application. The ALJ resolved these issues adversely to Williams and granted Capitol's application without comparing the applicants under the criteria articulated in *Comparative Policy Statement*, 1 FCC 2d 393 (1965). Williams has excepted to the denial of his application and the grant of Capitol's. According to Williams, Capitol not Williams should be disqualified in this proceeding. Capitol supports the *Initial Decision* and seeks grant of its application without further hearing.

CAPITOL CITY BROADCASTING: REQUESTS FOR ISSUES

A. Background

3. Williams has argued to the ALJ and now to the Board that the issues should be enlarged to add financial "and related" issues against Capitol. Williams' allegations about Capitol focus on Ronald E. Patterson, a fifty percent owner of Capitol, and Ronald's father, Malvin W. Patterson, Jr., from whom Capitol expects to receive financing for the proposed station. Williams argued to the ALJ that Malvin Patterson cannot guarantee a loan for the station because he was sued for $7,377.78 by the Bowie County, Texas Appraisal District in May 1990 for delinquent real estate taxes totalling $4,905.79 on eleven pieces of property and was again delinquent in 1991 on taxes totalling $1,837.27 for seven pieces of property. Williams' Petition to Enlarge the Issues against Capitol City Broadcasting Company, June 3, 1991, pages 12-13. Thus, Williams says, Ronald Patterson's personal financial condition is relevant, and he too has financial problems from alleged indebtedness he cannot service and that Williams assumes ultimately will encumber the proposed Longview station. Further, Ronald Patterson has been unemployed since leaving the bank where he

[1] The following pleadings are before the Board in this two-party case: Williams' April 6, 1992 Petition to Reopen the Record, Enlarge Issues against Capitol City Broadcasting Company and Remand for Further Proceedings; Williams' April 7, 1992, Errata; Williams' April 10, 1992 Supplement to Petition to Reopen the Record, Enlarge Issues against Capitol City Broadcasting and Remand for Further Proceedings; Williams' April 16, 1992 Exceptions and Brief; Williams' April 16, 1992 Request for Oral Argument; Capitol's April 22, 1992 Petition to Dismiss Exceptions; Williams' April 24, 1992 Comments on Petition to Dismiss Exceptions; Capitol's April 28, 1992 Opposition to Petition to Reopen the Record, Enlarge Issues against Capitol City Broadcasting Company and Remand for Further Proceedings; Williams' May 1, 1992 Motion to Dismiss Application of Capitol City Broadcasting Company; Capitol's May 4, 1992 Reply to the Exceptions and Brief of Matthew Williams; Williams' May 7, 1992 Reply; Capitol's May 11, 1992 Opposition to the Motion to Dismiss Application of Capitol City Broadcasting Company; Capitol's May 12, 1992 Supplement to Opposition to Petition to Reopen the Record, Enlarge Issues against Capitol City Broadcasting Company and Remand for Further Proceedings; Williams' May 18, 1992 Reply to Opposition to Motion to Dismiss Application of Capitol City Broadcasting Company; Capitol's June 5, 1992 Supplement to Opposition to Petition to Reopen the Record, Enlarge Issues against Capitol City Broadcasting Company and Remand for Further Proceedings; Williams' June 11, 1992 Comments on Unauthorized Supplement of Capitol City Broadcasting Company; Capitol's August 5, 1992 Petition for Leave to Amend; Williams' August 11, 1992 Comments on Petition for Leave to Amend; and Capitol's August 21, 1992 Supplement to Petition for Leave to Amend.

last worked in banking, although Patterson and his wife own a service station business (which Williams alleges contributes to Patterson's financial problems).

4. After considering the explanation in Capitol's opposition, the ALJ refused to add issues concerning Capitol's finances. He found that Williams had not shown diligence in discovering the facts he alleged as required by 47 CFR 1.229(d) and had not provided documents or declarations supporting the conclusions asserted. *Memorandum Opinion and Order,* FCC 91M-2061 at 2 (ALJ released July 5, 1991). On the merits, he found that Malvin Patterson had paid the largest sum due and had adequately explained the arrearage as either oversight or confusion about who was to pay the taxes in light of transactions involving the properties. *Id.* at ¶ 5. In denying Williams' request for permission to appeal this point, the ALJ further explained:

> Williams urges that the money owed is a sufficient inference to warrant a financial issue. Under some circumstances that might be the case. But at this stage of the proceeding, the inference asserted is not strong enough to warrant a hearing on the issue. First, as pointed out in the order, Mr. Patterson paid most of the taxes and owes only $1,800. Second, the reason most of the taxes were not paid had to do with Mr. Patterson's view that he did not owe the money; he believed that the taxes were owed by other buyers and sellers of the property in question. Mr. Patterson buys and sells land and the fact that the money was sought through suit does not show he cannot pay the taxes or finance the proposal. Williams has not shown that the failure to pay the taxes had anything to do with Mr. Patterson's fiscal soundness. The only actual evidence submitted about Mr. Patterson [sic] resources rebutted the inference claimed.

Memorandum Opinion and Order, FCC 91M-2229 at 1 (released July 19, 1991).

5. The ALJ also refused to add the requested financial issue on the basis of Ronald Patterson's financial condition, because "Williams has not shown that Patterson's financial condition inhibits Capitol's proposal." FCC 91M-2061 at 3. He was satisfied from Capitol's opposition that Patterson owed money but was not insolvent and that Williams had not accurately described the facts. In denying William's petition to appeal on this point, FCC 91M-2229 at 2, he further explained:

> There has been no legal finding that [Ronald Patterson] is insolvent; nor has Williams demonstrated that he is. It is not up to Mr. Patterson to respond to issues inadequately raised. At no time has the Commission insisted that only wealthy people apply for licenses. The issue is whether Capitol has reasonable assurance for money to construct and operate the station. Williams has not shown that Ronald Patterson's wealth is necessary to that showing and he has not shown that Capitol does not have reasonable assurance for funds it needs.

6. Williams takes exception to the ALJ's ruling because Capitol never disputed the documents he provided with his motion below, never denied Ronald Patterson's insolvency, did not contest Malvin Patterson's tax delinquencies, and did not provide evidence of Malvin's liquidity. Malvin's real estate taxes and federal and state tax liens against Patco Enterprises, Inc., the service station business owned by Ronald and his wife, are the bases for Williams' April 6, 1992 Petition to Reopen the Record, Enlarge Issues against Capitol City Broadcasting Company and Remand for Further Proceedings (Petition to Reopen). There Williams provided copies of four Notices of Federal Tax Lien Under Internal Revenue Laws aggregating $27,865 for failure to pay collected employee withholding taxes and failure to pay federal unemployment insurance that were served on Patco between February and September 1991, and he provided copies of two Notices of Tax Lien for Alabama Department of Revenue aggregating $4,877.33 for failure to pay for a privilege license and a penalty assessment that were issued to Patco and Ronald Patterson in October 1990 and March 1992. *Id.* at Exh. 1, 2. Assuming one hundred percent penalties, Williams estimated that Patco/Patterson must owe the State and Federal governments about $60,000. Williams also submitted correspondence from the Clerk of the Bowie County Appraisal District and accompanying computer printouts showing that Malvin Patterson's real estate tax liability was $4,424.95 as of April 1992. *Id.* at Exh. 3.[2]

7. Capitol opposes both Williams' Exceptions and his Petition to Reopen because of Williams' untimeliness in questioning Capitol's financial qualifications. In replying to Williams' Exceptions, Capitol argues that Williams' charge about Ronald Patterson's alleged insolvency is leveled without the required factual support, and that an inquiry into his personal financial qualifications would yield no legally significant findings because Capitol is not relying on Ronald Patterson for its financing. In opposing Williams' Petition, Capitol points out that Patco is a separate business interest of Ronald Patterson and his wife with no relationship to Capitol. Capitol also disputes the amount Williams claims is owed on Patco's behalf. Patco owes the state $2,111.04 and the federal government $35,666.25 in taxes but, according to Capitol, Ronald Patterson has agreed only to personal responsibility for the IRS penalty of $19,457.53 on Patco's liens; Patco is responsible for the underlying liens. *See* Agreement to Assessment and Collection of 100% Penalty, February 12, 1992, Opposition to Petition to Reopen, Attachment 1; April 15, 1992 letter from Mark B. Flagge, Compliance Officer, State of Alabama Department of Revenue, *id.,* Attachment 2. Regardless of the amounts owned, Capitol argues that Ronald Patterson's and Patco's obligations are not relevant here because it is relying on Malvin Patterson for funding, not Ronald, and Malvin has reaffirmed his commitment to provide Capitol with sufficient funds to construct and operate the proposed station. *Id.,* Attachment 3; May 12, 1992 Supplement to *id.* In its

[2] Williams also alleged that Ronald Patterson's home, which is mortgaged beyond its value, was scheduled for a tax sale but that Patterson paid the deficiencies just before the sale was to commence.

June 5, 1992 Supplement to its Opposition, Capitol attached receipts from the Bowie County (Texas) Appraisal District showing that Malvin Patterson paid his real estate taxes in full on all of his properties on June 4, 1992.

8. On May 1, 1992, Williams filed a Motion to Dismiss Application of Capitol City Broadcasting Company, alleging that Ronald Patterson's consent to federal tax penalties is an admission that Patterson willfully failed to pay over taxes withheld from employees as required by 26 U.S.C. § 6672, which is a felony under 26 U.S.C. § 7202 if done willfully. According to Williams, this breach of Patterson's duty as a corporate trustee of the money withheld for employee taxes implicates the *Character Policy Statement*, 102 FCC 2d 1179, 1205 nn.60, 61, 64 (1986) (subsequent history omitted), and can be resolved without any adjudication under section 7202 or at the Commission because Patterson has admitted to civil penalty liability and failed to report these matters to the FCC. Thus, Williams asks that Capitol be disqualified and its application dismissed without further hearing.

B. Discussion

9. Under section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(e), the Commission must hold a hearing if a "substantial and material question of fact is presented" that precludes the Commission from finding that the public interest will be served by a grant of the application. The dispute must be clearly and adequately alleged; it must be factual; and the question must be substantial and material before the Commission will hold a hearing. *See Weyburn Broadcasting Limited Partnership*, No. 91-1378, slip op. at 13 (D.C. Cir. Feb. 12, 1993); *David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253, 1257 (D.C. Cir. 1991); *California Public Broadcasting Forum v. FCC*, 752 F.2d 670, 674 (D.C. Cir. 1985). To maintain order in its proceedings and in the interest of expediting formal hearings, the Commission provides in 47 CFR 1.229(b)(1) for timely motions to enlarge issues. In comparative hearings for a new broadcast station, like this one, motions not filed within thirty days of the release of the hearing designation order must show good cause for filing outside this window. 47 CFR 1.229(b)(3). If the motion is based on new or newly discovered facts, it must be filed within fifteen days after such facts are discovered by the moving party. The movant's due diligence in timely discovering the alleged facts is an important consideration in the good cause assessment, for the Commission expects an applicant "to present its arguments as early as possible; it may not rest on its rights in the hope that the passage of time will improve its position." *Evergreen Broadcasting Company*, 7 FCC Rcd 6601, 6602 ¶ 8 (1992). Thus, a request for additional issues must be filed promptly after the facts become known or could reasonably have been known. *Great Lakes Broadcasting, Inc.*, 6 FCC Rcd 4331, 4332 ¶ 8 (1991).

10. Filing outside the window without good cause does not fully bar consideration of a motion to enlarge. In the absence of good cause, however, a motion to enlarge will be considered only if "it raises a question of probable decisional significance and such substantial public interest importance as to warrant consideration in spite of its untimely filing." 47 CFR 1.229(c); *Liberty Productions*, 7 FCC Rcd 7581, 7582 ¶ 11 (1992); *Joseph Bahr*, 7 FCC Rcd 2147, 2149 ¶ 10 (Rev. Bd. 1992). In codifying this policy, which had earlier been reflected in Commission case law,[3] the Commission emphasized, "It is expected that this standard will be strictly enforced." *Adjudicatory Re-regulation Proposals*, 36 RR 2d 1203, 1215 ¶ 23 (1976). See *Great Lakes Broadcasting*, 6 FCC Rcd at 4332 ¶ 8, 4333 ¶ 15, expressing the Commission's continued concern about expediting the hearing process and the institution of new service.

11. According to *Great Lakes Broadcasting, id.* at 4332 ¶ 9, allegations going to an applicant's basic qualifications, like Williams' challenge to Capitol's financial qualifications, meet the substantial public interest importance part of the test. So the question here is whether Williams has shown that his allegations are of probable decisional significance; *i.e.*, whether the likelihood of proving the allegations is so substantial as to outweigh the public interest benefits of proceeding to an orderly conclusion to this proceeding.[4] This requires something more than the *prima facie* showing of an applicant's lack of qualifications that Williams claims he has made.[5] There also must be a substantial and material question of fact after all the relevant information before the Commission is considered.[6] To establish this in the absence of good cause, Williams must show a substantial likelihood of proving his allegations that Capitol is financially unqualified.[7] *See Liberty Productions*, 7 FCC Rcd at 7583 ¶ 15. Viewed by this standard, Williams' Exceptions regarding Capitol's financial qualifications and his Petition to Reopen must be denied.

12. *Capitol's Reliance on Malvin Patterson for Financing.* Williams first questioned Malvin Patterson's real estate tax delinquency on June 3, 1991, the day the hearing started and long after the *Hearing Designation Order* was released on August 14, 1990, *sub nom. Caprock Educational Broadcasting Foundation*, 5 FCC Rcd 5170. Although Williams says the ALJ erred in finding the June 3 petition untimely, he supports his argument only by saying that "much evidence was new and all of it indicative of a *continuing* deterioration of [Capitol's] finances." Williams Exceptions at 22 n.37 (emphasis in original). We find no basis from this generalization to disagree with the ALJ's finding that Williams could have begun his discovery efforts earlier. Had he done so, he would have learned of Malvin Patterson's critical role in financing Capitol and then of his real estate tax delinquencies, for Malvin Patterson was sued for real estate taxes in May 1990, Petition to Reopen, Exh. 3A, and, according to Williams, had a fifteen year history of

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[3] *The Edgefield-Saluda Radio Co.*, 5 FCC 2d 148 (1966).

[4] "We note that if a hearing could be invoked merely upon the assertion of financial inability, the Commission's task . . . would be a hopeless one." *Tele-Media Corp. v. FCC*, 697 F.2d 402, 416 n. 49 (D.C. Cir. 1983).

[5] In *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985), the court described a *prima facie* case as one where allegations are based on sufficient specific facts that, if true, might persuade a reasonable factfinder that, for example, Patterson could not meet his commitment to Capitol.

[6] *See id.* at 395. A question is a substantial one if the totality of the evidence raises a sufficient doubt on the point that further inquiry is called for.

[7] No hearing is required even on a timely petition to enlarge the issues unless the Commission determines from the application, the pleadings, and other relevant information that a substantial and material question of fact is presented. *See generally Astroline Communications Company Limited Partnership*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

nonpayment of local property taxes. Williams Exceptions at 21. "[I]t is incumbent upon applicants to study their opponents' cases carefully and make their arguments as early as possible." *Liberty Productions*, 7 FCC Rcd at 7584 ¶ 21. The recent delinquencies Williams has alleged are merely cumulative and do not excuse Williams' lack of diligence in pursuing pre-hearing discovery. These alleged recent delinquencies also fail to establish good cause for Williams' redundant and cumulative allegations concerning Malvin Patterson in Williams' April 6, 1992, Petition to Reopen. The delinquencies appear to be "recent" only because of the timing of Williams' inquiries about them, not because of the occurrence of any notable events associated with them, and Williams has neither shown earlier unsuccessful efforts to discover information nor tendered a reason for not seeking information earlier.[8] *See generally Evergreen Broadcasting Company*, 7 FCC Rcd at 6602 ¶ 8 (applicant should not wait until its position improves to raise issues).

13. Williams also has not met the probable decisional significance standard in either his Petition before the ALJ or his Petition to Reopen to the Board. He has submitted factual information from the local appraisal district about unpaid real estate taxes, which Capitol does not dispute, and is relying on inference rather than any factual support connecting the unpaid taxes to Malvin Patterson's ability to finance Capitol.[9] Although an adverse inference drawn from unpaid real estate taxes could raise a substantial question in some circumstances, the inference under the circumstances here is not strong enough to compel a hearing. Patterson explained the delinquencies in a sworn declaration submitted with Capitol's opposition below. The ALJ found:

> Mr. Patterson has paid the largest sum claimed by Williams and he has explained that the taxes were not timely paid because he believed they were to be paid by the sellers of the property when he purchased it and that other amounts due were to be paid by buyers who purchased property from him. When he became aware of the problem, he paid the taxes due. The remaining amount due is under $2,000 and Mr. Patterson represents that it was not paid because of an oversight not because, as Williams alleges, he cannot pay the amount due.

Memorandum Opinion and Order, FCC 91M-2061 at p. 2 ¶ 5.[10] While the Commission would clearly be interested if shown significant debts impinging on a lender's ability to meet his commitment, the relatively small amounts involved here, all of which Patterson has now paid, and Patterson's unrefuted explanation below for not timely paying do not leave us with a substantial and material question of fact about his ability to finance Capitol as promised.[11] The Communications Act "in effect says that the Commission must look into the possible existence of a fire only when it is shown a good deal of smoke." *Citizens for Jazz on WRVR*, 775 F.2d at 397. While we do not expect Williams to prove that Malvin Patterson lacks adequate means to fund Capitol when seeking the issue, we expect something more than he has shown here, particularly in light of the untimeliness of the allegations.[12] *See generally F.E.M. Ray, Inc.*, 7 FCC Rcd 848, 848-49 (1992) (requested financial issue not added when petitioner provided no evidence as to why a source of funds had failed to make payments ordered in divorce proceeding or otherwise demonstrated the relevance of that circumstance to the instant proceeding); *Eve Ackerman*, 7 FCC Rcd 2493, 2495 ¶ 9 (Rev. Bd.) (assertion of outstanding judgments does not automatically require financial issue), *review denied*, 7 FCC Rcd 6872 (1992).

14. Williams has complained that Capitol did not respond to what he characterizes as a *prima facie* case with probative evidence of Malvin Patterson's financial means in the form of a financial statement. Commission precedent is clear that an applicant must have reasonable assurance of financing before certifying to its financial qualifications, and that reviewing the financial statement of a lender who

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[8] Supporting Williams Petition to Reopen are three letters to Williams' counsel from the Bowie County Appraisal District advising counsel of the total taxes due on Malvin Patterson's accounts. The May 28, 1991 letter from Wayne Bouterse, Collection Administrator, advised that the 1990 taxes totalling $1,837.27 were then the only delinquent taxes and they became due on February 1, 1991. This was filed with Williams' June 3, 1991 Petition to Enlarge the Issues as Exh. 9. The July 24, 1991 letter from Wayne Bouterse advised counsel of the total taxes, penalties and interest as of August 1, 1991. Petition to Reopen, Exh. 3A. The March 31, 1992 letter from Eva Morgan, Clerk, enclosed printouts showing all taxes due on property for Malvin Patterson. *Id.*, Exh. 3.

[9] In this electronic age, it should have been feasible to check other public records and search for published information about Malvin Patterson for leads to relevant information that could have helped him place the tax delinquencies in some context.

[10] For the ALJ's elaboration on this finding, see *Memorandum Opinion and Order*, FCC 91M-2229, *supra* ¶ 4.

[11] *Compare Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C. Cir. 1988) (FCC faulted for failing to hold hearing in light of contradictory facts on record and contradictory statements by licensee).

[12] The court found a good deal of smoke in *Weyburn Broadcasting Limited Partnership*, No. 91-1378 (D.C. Cir. Feb. 12, 1993). There the Board had remanded on a financial issue because a principal who was expected to pay part of the applicant's expenses had been sued by two banks for a total of about $19,000, counsel had withdrawn for nonpayment of legal fees, and the loss of a major asset of the other principals appeared to cause them financial harm. The ALJ had resolved the issues on summary decision and denied additional motions to enlarge issues on candor and real party in interest. The Board and the Commission affirmed his decision, but the court remanded because of unresolved questions concerning the adequacy of the applicant's cost analysis, a principal's ability to meet her share of the prosecution costs, the adequacy of information exchanged among the principals upon whom the applicant was relying for financing, the continued willingness of a principal to meet its commitment, and the applicant's continuous ability meet its expenses in light of the principals' delay in paying for their stock and the applicant's unpaid bills. The court also found unresolved questions concerning both the applicant's candor about these issues and whether another applicant that had passively merged with the original applicant had become the real party in interest in light of its assumption of the applicant's bill paying responsibility. In contrast, the issues here are straightforward. Relevant information has been exchanged between the Pattersons; no problems with meeting prosecution expenses have been alleged; and no questions about the lender's commitment had been raised. The only questions are whether the fact that Malvin Patterson had unpaid real estate taxes undermines his ability to provide funding and whether tax liens and penalties for which a principal may be liable are relevant when that principal is not providing any funding.

is not a financial institution is an acceptable means of making that determination. *See, e.g., Northampton Media Associates,* 4 FCC Rcd 5517 (1989), *aff'd,* 941 F.2d 1214 (D.C. Cir. 1991) (an applicant will be considered financially qualified if, at the time of certification, it has reasonable and reliable evidence that the necessary funds would be available). The record here shows that Ronald Patterson saw his father's financial statement before Malvin Patterson committed to the funding and assured himself that his father was sufficiently liquid to lend the funds. Tr. 106. It also shows that he annually sees his father's updated statement, which is prepared by an accountant. *Id.* If the financing were in issue, the financial statement "would be clear evidence to support the certification." *Northampton* at 5519 ¶ 16. However, contrary to Williams' assertion that Capitol has not provided probative evidence, Capitol need not present this evidence until the issue is properly joined. *See Priscilla L. Schwier,* 4 FCC Rcd 2659, 2660 (1989), *aff'd by judgment sub nom, New Life Evangelistic Center, Inc. v. FCC,* 895 F.2d 809 (1990).[13]

15. Contrary to Williams' assertions, Capitol also had no obligation to inform the Commission of Malvin Patterson's real estate tax obligations in the first instance. 47 CFR 1.65(a), which governs an applicant's obligation to report information to the Commission, requires only that an applicant report "a substantial change as to any . . . matter which may be of decisional significance in a Commission proceeding involving the pending application." Unless Malvin Patterson's obligations might have changed his financial situation and affected his ability to meet his commitment, the likelihood of which has not been shown, there is no basis for inquiring into Capitol's failure to report this non-decisional information. "[I]t is well settled that an issue will be added only upon a showing that the omitted material may be of decisional significance.'" *Van Buren Community Service Broadcasters, Inc.,* 87 FCC 2d 1018, 1020 ¶ 7 (Rev. Bd. 1981), *review dismissed,* 88 FCC 2d 1733 (1982). *See Azalea Corporation,* 38 FCC 2d 95, 101 ¶ 10 (Rev. Bd. 1972) (mere existence of lien not reportable unless materiality to applicant's financial qualifications demonstrated).

16. *Ronald Patterson's Finances.* Williams argues in his various pleadings that Ronald Patterson's problems require review under a financial issue, both because Capitol cannot rely on Malvin Patterson's ability to provide the funds and because Ronald's problems might follow him to the station. Williams complains in his Exceptions that the ALJ should have added an issue because Capitol did not discuss let alone disprove Williams' charges about Ronald Patterson's debts. In his Petition to Reopen Williams alleges that federal and state tax liens against Patco warrant financial and related issues. But, as with the issues concerning Malvin Patterson, Williams has not shown due diligence in raising these issues. The ALJ found that he did not timely raise the issues sought below for "[n]one of the facts arose within 30 days of Williams' filing; all could have been determined long before." FCC 91M-2061 at 2 ¶ 3. Although Williams excepts to this ruling, he does so with the same general argument used to justify his untimely arguments regarding Malvin Patterson, that "much evidence was new and all of it indicative of a *continuing* deterioration of [Capitol's] finances." Williams Exceptions at 22 n.37. Without more specificity, the Board is left to speculate about what might have been the basis for the error perceived by Williams, and this the Board will not do. *See Bible Broadcasting Network, Inc.,* 7 FCC Rcd 432, 433 n.3 (Rev. Bd.) (Board has no obligation to fashion arguments for parties), *rev. denied* 7 FCC Rcd 4578 (1992).

17. Williams' good cause showing in his Petition to Reopen the Record also fails for, as Capitol points out in its Opposition, the federal tax liens that are at the heart of the issues sought against Ronald Patterson were entered between February 4 and September 26, 1991, long before Williams' April 6, 1992 Petition. The Alabama tax lien for Patco's privilege license was entered October 10, 1990. Only the penalty for unpaid Alabama corporate tax was entered shortly before William's Petition, on March 18, 1992, but this single recent lien does not excuse Williams' failure to search public records and raise the federal tax liens and the earlier Alabama lien in a more timely fashion. Here again Williams has not explained why, with due diligence, he could not have timely discovered the federal tax liens or the earlier Alabama one and raised the issue before the ALJ. *See Kaye-Smith Enterprises,* 98 FCC 2d 675, 686 (Rev. Bd. 1984) (subsequent history omitted).

18. Because the allegations regarding Ronald Patterson were not timely raised, Williams must show that they meet the probable decisional significance standard of 47 CFR 1.229(c) by showing a substantial likelihood of proving that the debts and liens jeopardize the availability of Capitol's financing or otherwise undermine Capitol's ability to construct and operate the station without revenues for the first three months. *See Liberty Productions,* 7 FCC Rcd at 7583 ¶ 15. The obligations of an applicant's principal are not necessarily fatal in and of themselves to an applicant's financial qualifications. The critical question is the impact these obligations may have on the applicant's financial qualifications. For example, in *Richardson Broadcast*

[13] The cases Williams cites are clearly distinguishable. *Margaret Escriva,* 6 FCC Rcd 4455, *recon. dismissed,* 6 FCC Rcd 5391 (Rev. Bd. 1991), involves evidence submitted under a designated financial issue; there the application was remanded for further hearing because of contradictions in the record about the lender's intent to sell his business to meet his financing commitment and because the value of the business was not sufficiently established. *Aspen FM, Inc.,* 5 FCC Rcd 3196 (Rev. Bd. 1990) (susbsequent history omitted), discusses the evidence needed after a hearing is ordered. *Susan S. Mulkey,* 4 FCC Rcd 5520 (1989), like the Commission's decision in *Northampton,* held that reasonable assurance need not be supported by documents at certification; it has been vacated as moot by the Commission and no longer stands as precedent. 6 FCC Rcd 1814 (1991). (The court reviewing *Northampton* questioned this point as an unexplained deviation from past precedent but did not remand because other reasonable and reliable evidence was available when the applicant certified and reliance on such was consistent with past Commission precedent. *Northampton Media Associates,* 941 F.2d 1214, 1217 (D.C. Cir. 1991).) *Richardson Broadcasting Group,* 5 FCC Rcd 5285, 5290-91 (Rev. Bd. 1990) (subsequent reconsideration history omitted), notes without resolving concerns about an applicant's reasonable assurance in light of the bankruptcy of a co-owned station, foreclosure by the applicant's lender, notice of the bank's intent to sell the applicant's proposed transmitter site at auction, and the applicant's efforts to restructure its financing in light of this. Because of uncertainty surrounding the bankruptcy, including a pending petition to change proceedings begun under Chapter 11 to Chapter 7 of the bankruptcy code, the Commission remanded on a financial qualifications issue. 7 FCC Rcd 1583, 1586 (1992). The cited portion of *Las Americas Communications, Inc.,* 1 FCC Rcd 786, 787 ¶ ¶ 5-6, 61 RR 2d 1008, 1014 (Rev. Bd. 1986), deals with questions about the applicant's character.

Group, 7 FCC Rcd at 1586, the Commission remanded for further hearing because the bankruptcy of the general partner's co-owned station left considerable doubts about the availability of the co-owned station's transmitter site to the applicant and about who might ultimately control the station. Here, the circumstances of Ronald Patterson, who owns fifty percent of Capitol, do not appear to pose a similar threat to Capitol's financial qualifications. Capitol is not relying on Patco facilities or assets for the station.[14] Capitol's lender, Malvin Patterson, is aware of Ronald's personal financial condition and does not look to Ronald for any collateral for the loan. Letter from Malvin W. Patterson, Jr. to Ronald E. Patterson, July 16, 1988, Williams Petition to Enlarge the Issues, Exh. 7, June 3, 1991. In specific response to the allegations in Williams' Petition to Reopen, Malvin declared under penalty of perjury that:

> I am aware of my son's current financial condition. In particular I am aware of his obligations to the federal government and to the State of Alabama for taxes owed. My son's financial condition has had no adverse effect on my commitment to provide Capitol City Broadcasting Company with funds. I remain committed to provide Capitol City Broadcasting Company with sufficient funds to construct and operate its proposed station at Longview, Texas.

Declaration of Malvin W. Patterson, Jr., May 11, 1992, Supplement to Opposition to Petition to Reopen, May 12, 1992. Williams does not challenge this commitment and, as discussed above, his challenge to Malvin Patterson's ability to finance the station is insufficient. *See Las Americas Communications, Inc.*, 2 FCC Rcd 1614 (Rev. Bd. 1987) (financial problems at another business of principal of applicant do not affect applicant's financial qualifications where applicant is not relying on that principal or his other business for funding). Although Williams hypothesizes that the IRS may one day padlock the door at Capitol because of the liens, this thought assumes that Patco will go bankrupt and its assets will be insufficient to satisfy the IRS liens against it. At this time, this scenario is speculation.[15] The Commission looks ahead to the construction of the station and operation for the first three months without revenues when assessing financial qualifications.[16] Speculation that the station might be adversely affected at some indefinite future time does not raise a substantial enough question about Capitol's financial qualifications for a remand. *Cf. Cannon Communications Corporation*, 6 FCC Rcd 570, 571 ¶ 8 ("being financially qualified initially is no guarantee of ultimate financial success"), *review denied*, 6 FCC Rcd 3310 (1991).[17] [18]

19. *Alleged Misrepresentation.* Williams also alleges in his Exceptions that Ronald Patterson misrepresented the reasons for his dismissal as president of a Mobile bank in both his deposition and his hearing testimony and that the ALJ erred both in refusing to designate an issue and denying Williams' counsel the right to make an offer of proof on this point. In his Petition to Reopen the Record Williams repeats the charge. But, because Williams has offered no explanation for his concerns in either pleading, and has not even offered the required citation to the record of the alleged misrepresentations, *see* 47 CFR 1.277(a), the Board is left only with Capitol's Reply to Williams' Exceptions, pp. 22-23, for any insight into these allegations. According to Capitol:

> Williams' argument was based upon his misinterpretation of his own questions to Mr. Patterson at Mr. Patterson's deposition.
>
> Williams had argued that Mr. Patterson gave deliberately false testimony at his deposition in answer to questions he was asked concerning the termination of his employment from the Commonwealth National Bank. Dep. Tr. 38-39. In a declaration attached to Capitol's opposition to Williams' Petition, Mr. Patterson explained that when he was asked by Williams' counsel whether he was dimsissed [sic] from his position with the Commonwealth National Bank for cause, he understood the question to be whether he believed there was good cause to dismiss him. Mr. Patterson answered the question truthfully. He answered "no," he was not fired "for cause." Mr. Patterson answered in the negative because he firmly believed that no good cause existed for his dismissal.
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> The ALJ understood this, and concluded in his *MO&O* that the question of whether Mr. Patterson was fired for cause "is at best a matter of dispute

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[14] *Las Americas Communications, Inc.*, 101 FCC 2d 728 (Rev. Bd. 1985), on which Williams relies for the proposition that "financial and related issues must be added" because of the tax liens, Petition to Reopen at 9, is clearly distinguishable. There the Board designated issues against an applicant because a 50% general partner on whom the applicant appeared to be relying for half of its financing had not paid her federal income taxes at the time the applicant was certifying to its financial qualifications, apparently so that that applicant could demonstrate the requisite financial qualifications. In the instant case, Capitol is not relying on Ronald Patterson--or Patco--for any financing, and there is no suggestion that Patco's taxes were unpaid in order to finance Capitol. *See* n.21, *infra*.

[15] If, however, Williams should be proven more prophet than speculator in the future, Capitol would be expected to report any adverse impact on its financial qualifications under section 1.65.

[16] *See Financial Qualifications Standards for Aural Broadcast Applicants*, 69 FCC 2d 407 (1978). This standard is repeated in the instructions to the application form used by Capitol. *Instructions for FCC 301*, Instructions for Section III-Financial Qualifications, Item B, October 1986.

[17] We recognize that the Commission gave short shrift to the argument that loan proceeds might be needed to pay off an applicant's principal's tax lien in *Liberty Productions* because the lien had been substantially paid, which does not appear to be the case here. 7 FCC Rcd at 7584 n.13. Even so, when the Commission dismissed the argument that the availability of the loan proceeds to the applicant might be jeopardized in *Liberty*, the substantial penalties assessed in that case were being disputed and were a potential liability, *id.* at 7582 & nn.2 , 3, and the lender apparently expected a security interest in either the stock or sale proceeds of the broadcast station against which the lien had been levied. We do not read footnote 13 in *Liberty* as suggesting that a financial issue must be designated in the circumstances here simply because Patco's liens have not been satisfied.

[18] Because Ronald Patterson's personal financial circumstances have not been shown to be material to Capitol's financial qualifications, there is no need to consider Williams' ancillary arguments that Ronald's circumstances should have been reported under 47 CFR 1.65 and tha. Ronald misrepresented to the Commission when he testified that Capitol is financially qualified.

> between Mr. Patterson and the bank. But, in terms of Mr. Patterson's testimony, he was asked whether he was dismissed for cause and he said, *as he believes*, that he was not fired for cause." *MO&O*, para. 4 (emphasis added).

The ALJ further explained in paragraph 4 that Patterson "is involved in litigation about exactly that question and he believes that the term was used by the bank's new owners to keep from paying him money the bank owed him." We agree with the ALJ's ruling. The ALJ properly considered Patterson's credible explanation in reaching his conclusion for he may consider all of the pleadings and record before him when determining whether there is a substantial and material question of fact that must be heard. *Cf. Janice Fay Surber*, 5 FCC Rcd 6155, 6160 ¶ 29 (Rev. Bd. 1990) (inconsistencies in testimony caused by the framing of the questions to the witness are not basis for issue). Lacking any explanation whatsoever from Williams as to why the ALJ's ruling was in error and why this matter needs further exploration, we will not burden the Commission's resources by exploring this matter further. With respect to Williams' complaint that he could not explore this matter at hearing, the ALJ properly kept the hearing focused on the designated issues. The ALJ did not abuse his discretion by insisting that Williams first raise the matter in a petition to enlarge the issues, Tr. 89, which Williams did that same day. *See generally Priscilla L. Schwier*, 4 FCC Rcd at 2660-61 ¶ 9 (inquiry into specifics of a financial proposal not appropriate absent an issue).

20. *Motion to Dismiss.* In his Motion to Dismiss Application of Capitol City Broadcasting Company (Motion to Dismiss), Williams for the first time argues that Patco's tax lien problems raise character questions about Ronald Patterson in addition to the financial questions discussed above. According to Williams, Patterson's consent to penalties is an admission of criminal culpability and a concession that Capitol lacks the requisite character to be a Commission licensee, so its application should be dismissed without further consideration. In making this argument, Williams relies on two precedents, the Review Board's *Decision* in *Las Americas Communications, Inc.*, 1 FCC Rcd 786, and the Commission's *1986 Character Policy Statement*, 102 FCC 2d 1179. Neither supports the advocated result, for neither suggests that the Commission can dispose of an application on the basis of a potentially disqualifying issue without any Commission hearing on the issue. Indeed, such action would be contrary to both the Communications Act of 1934, as amended, and the Administrative Procedure Act.[19]

21. In the *1986 Character Policy Statement* the Commission expressed its reluctance to consider in Commission proceedings allegations of violations of law that had not been adjudicated in the first instance by the agency with primary jurisdiction over the alleged misconduct and that did not implicate an applicant's proclivity to deal truthfully with the Commission.[20] It did not foreclose consideration of allegations of misconduct in "egregious" circumstances that would be shocking to the conscience, however, even though the allegations were not adjudicated. 102 FCC 2d at 1205 n.60. The Board found such circumstances in *Las Americas*, where an applicant's principal and fifty percent owner had failed to pay income taxes or even file tax returns. The applicant had earlier unsuccessfully tried to avoid a hearing on financial and character issues by admitting the principal had not paid taxes on time but leading the Board to believe she had filed her returns. 1 FCC Rcd at 787 ¶ 5, 790-91. In light of the evidence taken before the ALJ,[21] the Board found that the applicant was unqualified for a number of reasons, including its principal's lack of candor about her tax problems, and found that the disqualification was further supported by the principal's tax abuses. 1 FCC Rcd at 790 ¶ 20, 791 ¶ 23. The Commission affirmed the disqualification only on the candor grounds. It vacated paragraph 5 where the Board had interpreted the *1986 Character Policy Statement* and found the tax problems to be egregious, and it specifically declined to consider whether "unadjudicated tax problems" are cognizable under the *Policy Statement*. *Las Americas Communications, Inc.*, 6 FCC Rcd 1507, 1510 ¶ 26, 1513 n.23 (1991).[22]

22. In 1990 the Commission revisited its *Policy Statement*, making "evidence of any conviction for misconduct constituting a felony" relevant to evaluating an applicant's character rather than only evidence of adjudicated dishonesty or antitrust. *1990 Character Policy Statement*, 5 FCC Rcd 3252, 3252 ¶ 4 (1990). The Commission emphasized its continued belief "that it is appropriate to refrain from making licensing decisions based on mere allegations of relevant non-FCC misconduct," even when those allegations were in the process of being adjudicated elsewhere. *Id.* at ¶ 7. However, the Commission has discretion to condition application grants on the outcome of pending proceedings and will consider doing so if the alleged misconduct is relevant to the Commission and "an

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[19] Section 309(e) of the Communications Act, 47 U.S.C. § 309(e), clearly provides that, if the Commission "for any reason" is unable to find that the public interest would be served by granting an application, "it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the ground and reasons therefor." The Administrative Act provides that decisions in adjudicatory cases must be made on the record and that a party is entitled to be heard in his own defense. 5 U.S.C. § 556(d). The Commission has carved a narrow exception to the hearing requirement for intentional deceit occurring during an FCC hearing. *See Richardson Broadcast Group*, 7 FCC Rcd at 1585 ¶ 9, citing *RKO General, Inc.*, 78 FCC 2d 1, 104 (1980), *aff'd RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981). Williams' allegations do not fall within this exception.

[20] The Commission was primarily interested in adjudicated fraudulent representations to governmental units, criminal misconduct involving false statements or dishonesty, or broadcast-related violations of antitrust or other laws dealing with competition.102 FCC 2d at 1195-97, 1200-1203.

[21] *See Las Americas Communications, Inc.*, 101 FCC 2d at 730-31, and n.14, *supra*. Character as well as financial issues were designated against the applicant because it appeared that the applicant's principal may have chosen not to pay her taxes so she could demonstrate her financial qualifications for the license. These issues were designated under *Violations of Applicants of Laws of United States*, 42 FCC 2d 399 (1951), which the Commission replaced with its *1986 Character Policy Statement*. When the Board designated these issues, the applicant appeared to be relying on the principal for half of its financing.

[22] The Commission's reference to "unadjudicated" tax problems suggests that an applicant's acknowledgment of unpaid taxes is not tantamount to an adjudication of criminal misconduct.

adjudication of that misconduct raises questions as to whether the applicant before the FCC is possessed of the requisite propensity to obey the law." *Id.* at 3253 ¶ 7. The factors the Commission will consider in weighing misconduct are the willfulness, frequency, currentness, and seriousness of the misconduct as well as the nature of the participation of managers or owners, efforts made to remedy the wrong, overall record of compliance with FCC rules and policies, and rehabilitation. *Id.* at 3252 ¶ 5; *1986 Character Policy Statement,* 102 FCC 2d at 1227-29. With respect to civil matters, the Commission confines its interest primarily to judgments relating to fraudulent representations to governmental units or mass media related antitrust violations. *Policy Regarding Character Qualifications in Broadcast Licensing,* 6 FCC Rcd 3448, 3448 ¶ 6 (1991). Furthermore, "[w]here . . . litigation has ended in a settlement agreement, consent decree, or acquittal and there is no admission or finding of unlawful misconduct, we believe it is generally inappropriate for us to reach legal conclusions on the basis of any stipulated facts." *Id.*

23. When the Commission's current character policy is applied to Ronald Patterson's tax problems from his interest in Patco, it appears that the fact that taxes are owed would not be disqualifying, for no criminal charges have been adjudicated or even sought against Patterson. We recognize that Patterson has acknowledged Patco's tax liability and has agreed to pay civil penalties, but this agreement involves no judgment of wrongdoing. Furthermore, the Board is not expert in evaluating possible criminal culpability for tax problems. We can only note that, as far as we are aware,[23] those who are expert in enforcing the tax laws have not chosen to seek more than civil penalties. Also, in contrast to *Las Americas,* there is no reason to suspect that Patterson tried to mislead either the Internal Revenue Service or the Commission about the problems.[24] This is a case of first impression under the current character policy and the Commission may view the matter differently, but as the Board interprets the policy, Ronald Patterson's failure to remit Patco's taxes, without more, is not "so egregious as to shock the conscience and evoke almost universal disapprobation," the standard set by the Commission for considering conduct that has not been adjudicated by another body. *1990 Character Policy Statement,* 5 FCC Rcd at 3254 n.5 , quoting from *1986 Character Policy Statement,* 102 FCC 2d at 1205 n.60. Thus, it is the Board's view that Ronald Patterson's failure to remit Patco's taxes, without more, does not raise a substantial and material question of fact about Capitol's characterqualifications to hold a broadcast license. No hearing is warranted on this issue, particularly at this late stage in the proceeding.

MATTHEW WILLIAMS: DISQUALIFYING ISSUES

A. Background

24. The ALJ designated an issue "[t]o determine whether Matthew Williams withheld information from the Commission, lacked candor, or misrepresented his interest in Blue Jay Productions, Inc." After hearing the evidence, he concluded Williams "has failed to demonstrate that he is reliable and trustworthy. He is not qualified to become a license." 7 FCC Rcd at 1941 ¶ 30, 1942 ¶ 34. Williams has strongly excepted.

25. The underlying facts are undisputed. Williams applied as an individual applicant for the Longview FM channel on August 16, 1988. At the time, he was general manager of KEES (AM) in Gladewater, Texas, near Longview and Vice President of the licensee, Blue Jay Productions, Inc., which his father Bruce Williams owned. Williams failed to disclose his position in Blue Jay or his father's interest in KEES in response to specific questions in the application form.[25] He said only that he "is employed presently as general manager of standard broadcast station KEES, Longview, Texas. He will divest himself of all interest in that station in the event that he is granted the construction permit on Channel 247C2, Longview, Texas." Williams Application, Exh. 1.

26. On August 23, 1990, Williams sought permission to amend his application to show that Blue Jay had acquired KYZS (AM) (formerly KDOK) at nearby Tyler, Texas in December 1989. Accompanying the amendment was an August 13, 1990 declaration from Bruce Williams that he owned one hundred percent of Blue Jay and would "divest of all ownership in and association with KEES" if Matthew Williams were granted the Longview station. Williams' amendment and accompanying pleading emphasized that Matthew had no *ownership* interest in Blue Jay.

27. Williams was deposed on April 29, 1991 in anticipation of the hearing on the standard comparative issue in this case. During the deposition he repeatedly denied that he was an officer or director of Blue Jay, although he was shown three documents suggesting the contrary. After the deposition, Williams reviewed corporate documents, Commission filings, and other documents showing him to be a Blue Jay officer and director or signed by him as a Blue Jay Vice President. On May 14, 1991, he filed a petition to amend his application, correcting the information about his media interests and showing his father's interest in Blue Jay. Attached to this petition were copies of the documents he had reviewed. Relying on these documents, Capitol successfully petitioned for misrepresentation/lack of candor and real party in interest issues against Williams.

28. Williams' position below was that he did not understand his role in Blue Jay to be that of an officer and that his erroneous answers during his deposition were not intentional. The ALJ concluded to the contrary. He found that "Williams' response to the questions raised about his

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[23] An indictment for willfully violating the tax laws would be reportable to the Commission under section 1.65 of the Commission's Rules, 47 CFR 1.65.

[24] The Proposed Assessment of 100-Percent Penalty showing Patco's unpaid tax liability reports the dates Patco's tax returns were filed. *See* Capitol Opposition to Petition to Reopen, Attach. 1.

[25] Section II, page 2, question 4 of the October 1986 FCC Form 301 used by Williams asks not only about a principal's interest in the instant applicant but also for disclosure of "[o]ther existing attributable media interests subject to the multiple ownership restrictions of Sections 73.3555 and 76.501 of the Commission's Rules." Williams responded "None." Section II, page 3, question 6(b) asks, "Does any member of the immediate family (*i.e.*, . . . *father* . . .) of *any party* to this application have any interest in or connection with any other broadcast station . . . ?" (Emphasis in original.) Williams checked the response "No."

role demonstrate that he is not someone the Commission can rely on to act honestly and exhibit good faith as a licensee." 7 FCC Rcd at 1940 ¶ 28. The ALJ found that, although Williams claimed he did not pay attention to what he was signing, he had signed his name directly above his title, and frequently the documents he certified and signed dealt directly with who owns and directs the affairs of Blue Jay. *Id.* Williams explained his lack of knowledge was not improbable because he believed he had the title of vice president, but that it carried no legal or official meaning, and he wanted people with whom he dealt to think him important. *Id.* at 1941 ¶ 28. From this the ALJ found that, if Williams were willing to deceive station employees and advertisers about his position at the station, "there is no reason to assume that he did not think the same dishonesty was acceptable when he made similar representations to the Commission and state authorities [in filings with them]." *Id.* The ALJ also found that Williams denied he was aware of what was being represented about his role, even when all objective evidence pointed to him as the source of the information. *Id.* at ¶ 29. The ALJ concluded:

> Williams, by his admission, repeatedly attempted to make people believe he was an officer of Blue Jay, when he claims that he thought he was not. He was perfectly willing to make similar representations to the Commission. Assuming he knew the truth, that he is an officer and director of Blue Jay, he was unwilling to reveal his ties to Blue Jay in this proceeding because of its obvious comparative impact. And because of the seriousness of that lie, he said that, when the representation that he was an officer was made to the Commission, he did not know it had been done, although almost always he signed the document making the representation. Williams has failed to demonstrate that he is reliable and trustworthy. He is not qualified to become a licensee.

Id. at ¶ 30.

B. Discussion

29. In excepting to the ALJ's conclusion, Williams does not dispute that his statements during the deposition were incorrect. He argues that they were not misrepresentations, however, for he merely misunderstood and was confused about his role with Blue Jay and was not trying to deceive anyone. Williams is correct that, before an applicant can be disqualified for misrepresentation, there must be "substantial evidence of an intent to deceive." *Armando Garcia,* 3 FCC Rcd 1065, 1067 ¶ 15 (Rev. Bd.), *rev. denied,* 3 FCC Rcd 4767 (1988); *see Fox River Broadcasting, Inc.,* 93 FCC 2d 127, 129 (1983). Intent is a factual question that, like other factual questions, can be found from evidence affording a reasonable inference. *See California Public Broadcasting Forum,* 752 F.2d at 679. Fraudulent intent can be found from "'the fact of misrepresentation coupled with proof that the party making it had knowledge of its falsity.'" *David Ortiz Radio Corp. v. FCC,* 941 F.2d 1253, 1260 (D.C. Cir. 1991), quoting from *Leflore Broadcasting Co. v. FCC,* 636 F.2d 454, 462 (D.C. Cir. 1980). The ALJ found, "It is highly improbable that [Williams] was unaware of his role as an officer and director of Blue Jay," when he completed his application and was questioned at his deposition. 7 FCC Rcd at 1940-41 ¶ 28. This conclusion, particularly with respect to Williams' deposition testimony upon which the Board has focused its review, is supported by FCC filings identifying Williams as an officer and certified by Williams, the corporate documents he signed showing his election as an officer, his holding himself out as a corporate officer, and the authority he actually exercised.

30. Williams argues that he did not understand himself to be a corporate officer because he equated corporate office with corporate ownership, and he had none of that. He had testified at the hearing that "Vice President as far as I was concerned was just a -- a title that my father let me use for expediency," Tr. 196, and that he had used it. Tr. 199. But, ownership reports filed with the Commission on April 1, 1988 and January 17, 1990 and certified as correct by Williams, the assignee's section of the KYZS (then KDOK) assignment application filed with the Commission on July 31, 1989 and certified as correct by Williams, and the Minutes of Joint Annual Meeting of Stockholders and Directors signed by Williams all reported that Williams is a Blue Jay officer with the position of "Vice President."[26] Capitol Exhs. 5, 9, 10, 14, 15, 16. The Minutes reflect that "meetings" were held on April 15, 1988, December 15, 1989, and April 16, 1990. Williams signed the ownership reports and assignment application as "Vice President" and the Minutes as "Secretary."[27] When questioned about this during testimony about the ownership reports, Williams said he did not know who prepared

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[26] The Minutes of Annual Meeting additionally reported that Williams is secretary and a director of Blue Jay. Capitol Exhs. 14, 15, 16. Williams' signature appeared on the page listing him and his father as the only Blue Jay officers and directors. Williams also was reported as Blue Jay's Vice President in Table I of the KEES assignment application, Capitol Exh. 13, and in corporate documents filed with the State of Texas, Capitol Exh. 19, but he did not sign these and the record is vague about when he first saw them.

[27] The certifications on both ownership reports read:

> I certify that I am Vice President of Blue Jay Productions, Inc., d/b/a/ Williams Communications that I have examined this Report, that to the best of my knowledge and belief, all statements in the Report are true, correct and complete.

The Commission's instructions for completing this certification require that the person certifying to the accuracy of the information must be an appropriate officer in the licensee corporation. FCC 323 Instructions, Instruction 1(d). The instructions for completing the assignment application provide that the certification is to be completed for a corporation by an officer. FCC 314 Instructions, p. 6.

The Commission attaches considerable significance to an applicant's signature. *See Mary Ann Salvatoriello,* 6 FCC Rcd 4705 (1991). In *Emision de Radio Balmeseda, Inc.,* 7 FCC Rcd 3852, 3855 ¶ 21, 3858 ¶ 39 (Rev. Bd. 1992), a false jurat issue was added where, despite an applicant's sworn oath to the contrary, it appeared that the applicant had not read her amendment.

the 1988 ownership report, that he would have looked over the ownership reports but he did not recall taking note of the officers, he would not always understand what he read and, in spite of being listed as an officer with his father, he did not think a vice president was an officer. Tr. 203, 205-209. About the corporate minutes, he said the board never met, that this was explained to him as just standard boilerplate, he does not recall reading the 1988 minutes or signing the 1989 minutes, and the papers probably came to him from his father's attorney who had been sending him documents to sign all of his life and whom he trusted. Tr. 229, 231-32, 236-37, 239. He said he concerned himself only with what he owned. Tr. 231-32.[28] We must agree with the ALJ that, from the documentary evidence, it is highly improbable that Williams had not noticed he was an officer.

31. But, not only was Williams identified as a corporate officer in documents he certified as accurate, he also acted as a Blue Jay official, as the ALJ concluded. 7 FCC Rcd at 1940 ¶ 27. The ALJ based his conclusion on the fact that Williams signed documents as an officer and certified his role to the Commission. Williams had tried to minimize his importance as a Blue Jay official in his direct testimony and during cross examination by explaining he just signed documents prepared by others, *see* 7 FCC Rcd at 1939 ¶ 9, Tr. 206-07, but the record is stronger on this point than the ALJ's conclusion suggests. For example, when Blue Jay bought KDOK, Williams brought the idea to his father and implemented it, working closely with counsel on the application and signing the accompanying asset purchase, lease, and escrow agreements[29] as well as the FCC application itself on behalf of Blue Jay. Apart from consenting to the purchase and setting a limit for legal expenses, Bruce Williams does not appear to have been involved. Capitol Exh. 5, Tr. 319-20, 373, 374-76, 360, 380-81; *see* 7 FCC Rcd at 1938-39 ¶ ¶ 6, 15. In fact, he testified that he relied on Matthew and the seller to handle the purchase. Tr. 358-60. Matthew explained he had authority to file the KEES renewal, "Because it was my understanding that I could -- the ultimate responsibility fell back on my father, but that he entrusted me to be able to -- to not endanger his business interest in East Texas and I would never do that." Tr. 219. When queried by the ALJ about his authority, he responded that it was "To act in my father's behalf or the company's behalf, yes." Tr. 219-20. Bruce Williams explained that, while he retains final responsibility, Matthew Williams has "day-to-day authority." Williams Exh. 4, p. 3. A preponderance of the record evidence shows that Williams knew he was a Blue Jay officer, not just an employee, when he testified to the contrary.

32. Fraudulent intent can also be found from a motive to deceive. *See Imagists*, 6 FCC Rcd 7440, 7445 ¶ 22 (Rev. Bd. 1991). The ALJ concluded Williams "was unwilling to reveal his ties to Blue Jay in this proceeding because of its obvious comparative impact," 7 FCC Rcd at 1941 ¶ 30, which, if true, is sufficient to establish intent. *Compare Pleasure Island Broadcasting, Inc.*, 6 FCC Rcd 4163, 4164 ¶ 12 (Rev. Bd.) (no motive to misrepresent where no comparative credit flowed from the exaggerated claim). Williams challenges this conclusion because the ALJ did not elaborate on the comparative impact behind this conclusion. However, it is clear from the findings and conclusions that Williams had not made a sufficient and timely enough pledge to divest himself of his interest in Blue Jay and KYZS to avoid a comparative demerit for that interest under the criteria identified in *Comparative Policy Statement*, 1 FCC 2d at 394-95.[30] Thus, the diversification demerit Williams could expect in the comparative analysis if his Blue Jay interest were disclosed in this proceeding could outweigh the credit Williams sought for his promise to be an integrated manager of his proposed station. *See Bible Broadcasting Network, Inc.*, 7 FCC Rcd 4578, 4578-79 ¶ 6 (1992) (slight diversification demerit awarded because of minority shareholder's position as officer in broadcast licensee overcame the applicant's slight advantage for its integration proposal).[31] Williams questions the rationality of concealing information available from the Commission's records--as do we--but such information is not automatically included in hearing records and was not forthcoming here until Capitol searched for some information and con-

[28] Williams also signed renewal applications for KEES and KYZS as "Vice President." In each case his signatures were certifications "that the statements in this application are true, complete, and correct to the best of my knowledge and belief, and are made in good faith." Capitol Exhs. 11, 12. The instructions to each required that the certification must "be personally signed . . . by an officer, if the applicant is a corporation." FCC 303-S Instructions, p. 3, May 1988. Williams signed certifications on the Broadcast Equal Employment Opportunity Program Reports for KEES and KYZS as "Vice President." Above the certification, the Report form clearly requires that the certification be signed "[b]y an officer, if a corporation." Capitol Exhs. 11, 12. Williams signed additional documents as "vice president." *See* Letter to Ms. Donna Searcy, Jan.19, 1990, Capitol Exh. 7; bank signature card, Capitol Exh. 32. Capitol Exhibits 7 and 32 do not show that "vice president" is a corporate officer position as opposed to a mere "title." The Board has considered them evidence that Williams held himself out as a vice president, not as evidence that this position is, in fact, a corporate office. *See* Tr. 198-99. Williams signed program agreements with Mutual Broadcasting Network and NBC Radio Networks as "Pres." or "President" because, he said, he wanted the employees to think he had more status than a general manager would have. Capitol Exh. 23, 25, 26, 27, 29, 30, Tr. 283-85. This is additional evidence that he held himself out as a corporate officer.

[29] Nothing in the record suggests that these agreements were not binding on Blue Jay because they were signed by Matthew rather than Bruce Williams.

[30] At hearing counsel conceded that Williams' commitment to disassociate himself from Blue Jay was untimely. Tr. 137. Williams acknowledged in his Exceptions that his commitment to disassociate himself from KYZS was untimely. Exceptions, p. 17. Williams' position as a Blue Jay officer distinguishes his situation from the treatment of parties to applicants with employment relationships at other stations in *Northland Communications*, 100 FCC 2d 914, 919 (Rev. Bd. (1985), *Reginald A. Fessenden Educational Fund, Inc.*, 100 FCC 2d 440, 445-46 (Rev. Bd. 1985); *Talleyrand Broadcasting*, 103 FCC 2d 476, 477-78 (Rev. Bd. 1985). A position as an officer is considered a media interest. *Phoenix Media Corp.*, 2 FCC Rcd 498, 499 ¶ 14 (1987).

[31] Williams misses the point with his argument that the Commission has not been deceived by his position with Blue Jay because it is accurately disclosed in information on file outside the record here. The point is whether Williams sought to mislead Capitol during his deposition so that this accurate information would not be introduced into this proceeding where it could be decisional. "Truthfulness and full candor are as much expected during discovery as they are with respect to submissions to the Commission itself." *Edwin A. Bernstein*, 6 FCC Rcd 6841, 6844 n.6 (Rev. Bd. 1991).

fronted Williams with documents contradicting his sworn testimony during his deposition. Had Capitol accepted Williams' representations, the outcome here might have been different.[32] He argues, however, that he discovered the error through his post-deposition investigation and was forthcoming with documents.[33] But, his investigation took place only after he had denied being a Blue Jay officer and been confronted with documents contradicting his denial. This does not contradict the finding that he had a motive to conceal his Blue Jay ties when he denied them at his deposition.[34]

33. Finally, as a general matter the Commission gives deference to the credibility findings of its administrative law judges unless the findings are patently in conflict with the record evidence. *See Naguabo Broadcasting Company,* 6 FCC Rcd 912, 919 (Rev. Bd. 1991). The ALJ is in a position to observe the witness' demeanor and evaluate his credibility, as the ALJ did here. The Board is responsible to look behind such findings to assure substantial record evidence in support, *see generally* 5 U.S.C. § 706(2)(E), and will reverse if solid record support is not present. Here, however, as discussed above, there is solid documentary and testimonial evidence to support the ALJ's failure to credit Williams' explanation for his conduct. The only evidence supporting Williams' position in his Exceptions is his own testimony that he did not understand himself to be a Blue Jay officer. But, such evidence, by virtue of its self-serving nature, is accorded less weight than both the documentary evidence here that Williams was a Blue Jay officer at the time of his deposition and knew it and Williams' admission that he had held himself out as a Blue Jay officer. Williams tried to corroborate his position with the testimony of Bruce Williams, his father. But, this testimony is carefully worded to make clear that Bruce Williams retained and exercised ultimate authority for Blue Jay's licenses. Williams Exh. 4, p. 3. There is no reason to doubt this for Bruce Williams owns all of Blue Jay's stock, but the retention of the final say in no way precludes delegating substantial authority to another officer as Bruce Williams appears to have done when putting his son in charge of his broadcast interests.[35] Although, as Williams points out in note 24 to his Exceptions, the ALJ did not make specific demeanor findings, "credibility apprehends the over-all evaluation of testimony in light of its rationality or internal consistency and the manner in which it hangs together with other evidence." *Carbo v. United States,* 314 F.2d 718, 749 (9th Cir. 1963). A witness' demeanor when testifying provides the trier of fact with further insight into his credibility, but the lack of specific demeanor findings when other reasons are given for the ALJ's analysis of a witness' credibility is not a basis for disregarding it or diminishing its weight. *Standard Broadcasting, Inc.,* 7 FCC Rcd 8571, 8576 ¶ 17 (Rev. Bd. 1992). *See generally TeleSTAR, Inc.,* 3 FCC Rcd 2860 (1988) (FCC affirmed finding of applicant misrepresentation despite lack of specific demeanor findings), *aff'd by judgment,* 886 F.2d 442 (D.C. Cir. 1989) (table). In ultimately disbelieving William's explanations about his knowledge of his role in Blue Jay, the ALJ said, "Williams' response to the questions raised about his role demonstrate that he is not someone the Commission can rely on to act honestly and exhibit good faith as a licensee." 7 FCC Rcd at 1940 ¶ 28. He found the explanations "highly improbable," *id.,* and Williams himself dishonest. *Id.* at 1941 ¶ ¶ 28-30.[36] There is substantial record evidence to support this view and therefore Williams' disqualification under the misrepresentation/lack of candor issue. [37]

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[32] In saying this, we do not suggest that the Board has made any comparative analysis in this case. The ALJ did not make conclusions under the comparative issue, and neither have we.

[33] Capitol takes issue with Williams claim to have been forthcoming with documents, arguing that Williams fought compliance with discovery requests on this very issue. Capitol cites to pleadings opposing document production and oral deposition notices. Capitol Reply at 4.

[34] The findings that Williams knowingly testified that he was not a Blue Jay officer and had a motive to conceal this at his deposition distinguish his situation from those involving carelessness, mistakes, or inadvertence in the cases on which Williams relies when arguing he did not misrepresent to the Commission. *Compare Bluegrass Broadcasting Co.,* 43 FCC 3d 990, 993 (1973); *Hampshire County Broadcasting Co., Inc.,* 99 FCC 2d 600, 603 (Rev. Bd. 1984); *Kaye-Smith Enterprises,* 98 FCC 2d 675, 681 (Rev. Bd. 1984); *Baker Protective Services, Inc.,* 97 FCC 2d 570, 577 (Rev. Bd. 1984) (inadvertent errors resulted from layers of unintegrated corporations); *John C. Roach,* 43 FCC 2d 685, 689 (Rev. Bd.) (inferences must be drawn from the facts of the particular case); *F.B.C.,* 3 FCC Rcd 4595, 4597 (M.M. Bur. 1988).

[35] In trying to give the flavor of his involvement with his businesses in light of the fact that he is a very busy man, Bruce Williams testified that he has enormous amounts of paperwork prepared for him by lawyers and accountants--including his tax returns--to which he gives cursory attention and that he uses and relies on professionals. Williams Exh. 2; Tr. 360. He also said that he approved FCC documents and had them sent to Williams, Williams Exh. 2, pp. 4-5, although this was not the case with respect to the KYZS purchase. Tr. 373, 380. Because Bruce Williams is such a busy man, Matthew Williams felt responsible for looking out for his broadcast interests and had authority to file such documents as renewal applications. Tr. 219-20. Bruce Williams was not even sure where KEES is located, Tr. 119-20, and his decision to buy it depended on Williams' willingness to move to East Texas and run it. Tr. 354.

[36] In excepting to the ALJ's conclusions on the real party in interest issue, Williams takes issue with the characterization of Stephanie Sommer's testimony in paragraph 29 of the *Initial Decision.* Williams complains that Ms. Sommer did not testify that he is the source of an inaccurate statement in the KDOK assignment application, as the ALJ found. That inference can be drawn from Ms. Sommer's testimony that she dealt with Matthew, not Bruce, Williams in preparing that application, Tr. 380-81, but she testified that she could not recall where she got the particular information when she prepared the application. Tr. 379. In affirming the ALJ, the Board is not relying on the ALJ's conclusion on this point.

[37] The ALJ also found against Williams on the issue of whether Bruce Williams and/or Blue Jay Productions, Inc. is a real party in interest in Matthew Williams' application, but he did not say whether he viewed this conclusion as an independent or cumulative ground for disqualification or as affecting Williams' integration proposal under the comparative criteria. In light of the Board's affirmance of the ALJ's conclusion that Williams is disqualified under the misrepresentation/candor issue, the Board does not need to reach Williams' exceptions under this issue. "An agency, like a court, need not decide questions which are not relevant to its decision." *Deep South Boradcasting Co. v. FCC, 278 F.2d 264, 266 (D.C. Cir. 1960).*

34. ACCORDINGLY, IT IS ORDERED That the Petition to Dismiss Exceptions filed by Capitol City Broadcasting Company IS DENIED, and the Petition for Leave to Amend filed by Capitol City Broadcasting Company IS GRANTED.

35. IT IS FURTHER ORDERED That the Petition to Reopen the Record, Enlarge Issues against Capitol City Broadcasting Company and Remand for Further Proceedings, the Motion to Dismiss Application of Capitol City Broadcasting Company, and Request for Oral Argument[38] filed by Matthew Williams ARE DENIED.

36. IT IS FURTHER ORDERED That the application of Capitol City Broadcasting Company (File No. BPH-880812MZ) IS GRANTED, and the application of MATTHEW WILLIAMS (File No. BPH-880816OC) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

CONCURRING STATEMENT OF BOARD MEMBER NORMAN B. BLUMENTHAL

In supervising this decision, my colleague has striven assiduously to track the cases in which the full Commission has addressed the impact of tax (and other) liens on the financial qualifications of a broadcast applicant. It must be said, however, that the cases relied upon were decided before the court issued *Weyburn Broadcasting Limited Partnership v. FCC*, No. 91-1378 (D.C. Cir. February 12, 1993), where the majority expressed its view that the Commission had treated too lightly questions relating to the "winner's" finances.

In the instant proceeding, the decision awards the construction permit to an applicant who admits to $35,666.25 in unpaid tax liens to the U.S. government (not including $19,457.53 in penalties). Hewing, it believes, to Commission case precedent, the majority finds that insufficient doubt has been raised, because it is said that funding for this proposed station will come from the applicant's father.

This may be true, but it raises again a question left unresolved in a prior proceeding. This Board, in *Las Americas Communications, Inc.*, 1 FCC Rcd 786 (Rev. Bd. 1986), disqualified an applicant, in part, for failure to file or pay personal income taxes for two years running, using the money instead to prosecute her Newark, New Jersey radio application. *See id.* at 789-791 & n.4.[1]

Though the *Las Americas* facts are different, a similar redolence is emitted here and a kindred question raised: is this application being prosecuted, in effect, on the taxpayer's cuff? That is, if Patterson's father can afford to stake his son to the considerable amount necessary to prosecute an FCC application and build and operate a new Texas broadcast facility, why does the son not use that money *first* to pay back federal taxes?[2] And how is the public interest benefitted by awarding a very valuable piece of federal property to an individual who, at the same time, shows no sign of remitting what he *already* owes to his fellow taxpayers.[3]

This is a policy question that would benefit from Commission attention.

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[38] The Board forgoes oral argument where it would not lend valuable assistance in resolving the issues before it. *See Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 163 (1990).

[1] In its review of *Las Americas*, the Commission took the unusual step of vacating those paragraphs of the Board decision ("paras. 5, 14-16") relating to the subject applicant's financial qualifications, but did not disturb those Board paragraphs (para. 17 *et seq.*) relating to the subject applicant's tax liens. *See* 6 FCC Rcd 1507, 1513 n.23 (1991).

[2] None of this is to say that, merely because an applicant or licensee is experiencing short-term financial difficulties, even tax difficulties, that disqualification for licenseeship follows. There are many conceivable mitigating circumstances; but none seem apparent here.

[3] It would be ironic, indeed, if while not paying his back taxes, Patterson acquired the permit and flipped the frequency after only one year, *see Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992), for a private profit. It would be at least as ironic if, as Patterson's opponent posits, the federal government was compelled to satisfy its *existing* liens by levying on the new station.

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re

High Tech Communications of Iowa, Inc. — File No. 316MS0011

Notice of Apparent Liability for Forfeiture Penalty for Station KNKG447 in the Public Land Mobile Service at East Moline, Illinois

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 1, 1993; **Released: March 12, 1993**

By the Chief, Mobile Services Division:

1. On October 4, 1991, the Commission granted an authorization to High Tech Communications of Iowa, Inc. (High Tech) to operate on frequency 931.1375 MHz at East Moline, Illinois. The expiration date of the authorization was October 4, 1992. On December 18, 1992, High Tech filed FCC Form 489, Notification of Status of Facilities, requesting reinstatement. The FCC Form 489 included a statement notifying the Commission that construction had been completed and operation had commenced.

2. Section 22.9(b)(1) of the Commission's Rules states:

> *Notification of status of facilities. (FCC Form 489).* When construction has been completed in accordance with the radio station authorization, the licensee shall so notify the Commission using Form 489. Licensees can commence service the day Form 489 is placed in the mail to the FCC.

Therefore, because High Tech commenced operation without timely filing FCC Form 489 with the Commission, it is in apparent violation of Section 22.9(b)(1).

3. Section 503(b) of the Communications Act states in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
>
> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter... shall be liable to the United States for a forfeiture penalty.

We find that High Tech's failure to file a Form 489 until December 18, 1992, constitutes willful and repeated conduct within the terms of the statute.[1]

4. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures,* 6 FCC Rcd 4695 (1991), *recon. denied,* 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA v. FCC,* No. 92-1321 (D.C. Cir. filed July 30, 1992), the base forfeiture amount for failing to file required forms is $30,000. The forfeiture is being adjusted downward by $15,000 because failing to file an FCC Form 489 is a relatively minor violation, and by an additional $9,000 because High Tech voluntarily disclosed its failure to file the FCC Form 489. Consequently, a $6,000 forfeiture is assessed.

5. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b) and Section 1.80 of the Commission's Rules, 47 C.F.R. Sec. 1.80, IT IS ORDERED that High Tech Communications of Iowa, Inc. IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of Six Thousand Dollars ($6,000) for willful and repeated violations of the aforementioned rule. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

6. Payment of the forfeiture may be made by mailing a check or similar instrument, noting on the payment the File Number of the above captioned proceeding, to the Commission within thirty (30) days of the release date of this order, payable to the order of the Federal Communications Commission to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

7. A copy of this Notice is being sent to High Tech Communications of Iowa, Inc., 3088 State Highway 27, Kendall Park, New Jersey 08824, by Certified Mail, Return Receipt Requested.

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[1] Section 312(f)(1) of the Communications Act provides:

> The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

This definition applies to Section 503(b) of the Communications Act. *See Southern California Broadcasting Co.,* 6 FCC Rcd 4387 (1991).

Section 312(f)(2) of the Communications Act provides:

> The term "repeated", when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

This definition applies to Section 503(b) as well. *See* H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 50-51 (1982).

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re

High Tech Communications of Iowa, Inc. File No. 316MS0012

Notice of Apparent Liability for Forfeiture Penalty for Station KNKG445 in the Public Land Mobile Service at Tipton, Iowa

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 1, 1993; Released: March 16, 1993

By the Chief, Mobile Services Division:

1. On October 3, 1991, the Commission granted an authorization to High Tech Communications of Iowa, Inc. (High Tech) to operate on frequency 931.1375 MHz at Tipton, Iowa. The expiration date of the authorization was October 3, 1992. On December 18, 1992, High Tech filed FCC Form 489, Notification of Status of Facilities, requesting reinstatement. The FCC Form 489 included a statement notifying the Commission that construction had been completed and operation had commenced.

2. Section 22.9(b)(1) of the Commission's Rules states:

> *Notification of status of facilities. (FCC Form 489).* When construction has been completed in accordance with the radio station authorization, the licensee shall so notify the Commission using Form 489. Licensees can commence service the day Form 489 is placed in the mail to the FCC.

Therefore, because High Tech commenced operation without timely filing FCC Form 489 with the Commission, it is in apparent violation of Section 22.9(b)(1).

3. Section 503(b) of the Communications Act states in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
>
> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter... shall be liable to the United States for a forfeiture penalty.

We find that High Tech's failure to file a Form 489 until December 18, 1992, constitutes willful and repeated conduct within the terms of the statute.[1]

4. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures,* 6 FCC Rcd 4695 (1991), *recon. denied,* 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA v. FCC,* No. 92-1321 (D.C. Cir. filed July 30, 1992), the base forfeiture amount for failing to file required forms is $30,000. The forfeiture is being adjusted downward by $15,000 because failing to file an FCC Form 489 is a relatively minor violation, and by an additional $9,000 because High Tech voluntarily disclosed its failure to file the FCC Form 489. Consequently, a $6,000 forfeiture is assessed.

5. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b) and Section 1.80 of the Commission's Rules, 47 C.F.R. Sec. 1.80, IT IS ORDERED that High Tech Communications of Iowa, Inc. IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of Six Thousand Dollars ($6,000) for willful and repeated violations of the aforementioned rule. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

6. Payment of the forfeiture may be made by mailing a check or similar instrument, noting on the payment the File Number of the above captioned proceeding, to the Commission within thirty (30) days of the release date of this order, payable to the order of the Federal Communications Commission to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

7. A copy of this Notice is being sent to High Tech Communications of Iowa, Inc., 3088 State Highway 27, Kendall Park, New Jersey 08824, by Certified Mail, Return Receipt Requested.

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[1] Section 312(f)(1) of the Communications Act provides:

> The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

This definition applies to Section 503(b) of the Communications Act. *See Southern California Broadcasting Co.,* 6 FCC Rcd 4387 (1991).

Section 312(f)(2) of the Communications Act provides:

> The term "repeated", when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

This definition applies to Section 503(b) as well. *See* H. R. Rep. No. 97-765, 97th Cong. 2d Sess. 50-51 (1982).

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-54

In re Applications of

GAF BROADCASTING COMPANY, INC. File No. BRH-910201WL

For Renewal of License
of Station WNCN(FM) (104.3 MHz),
New York, New York

CLASS ENTERTAINMENT AND COMMUNICATIONS, L.P. File No. BPH-910430ME

THE FIDELIO GROUP, INC. File No. BPH-910502MQ

For a Construction Permit
for a New FM Station on
104.3 MHz at New York, New York

HEARING DESIGNATION ORDER

Adopted: March 1, 1993; Released: March 15, 1993

By Chief, Audio Services Division:

1. The Commission has before it: (a) an application for renewal of license of Station WNCN(FM), New York, New York, filed February 1, 1991, by GAF Broadcasting Company, Inc. ("GAF"); (b) an application for a construction permit for a new FM broadcast station in New York, New York, filed April 30, 1991, by Class Entertainment and Communications, L.P. ("Class"); and (c) an application for a construction permit for a new FM station in New York, New York, filed May 2, 1991, by The Fidelio Group, Inc. ("Fidelio").[1] The applications are mutually exclusive because GAF operates WNCN(FM) on 104.3 MHz, the frequency sought by Class and Fidelio.

Class Amendment

2. On March 13, 1992, Class filed a Petition for Leave to Amend its application. Class is a limited partnership which originally had three general partners. The amendment reports that one of the general partners, Barbara J. Norris, who initially held a 12.43% ownership interest in Class, has withdrawn from the limited partnership, and her ownership interest has been transferred to one of the two remaining general partners. In comments filed March 26, 1992, GAF urges that acceptance of the Class amendment must be conditioned "to guard against an impermissible comparative upgrade."

3. The Class amendment will be accepted. However, pursuant to longstanding Commission policy, no comparative advantage from this amendment will be allowed. *See V.O.B., Inc.*, 5 FCC Rcd 5872 (Rev. Bd. 1990).

Request for Return of Fidelio Application

4. On May 30, 1991, GAF petitioned for the return of Fidelio's application as unacceptable for filing. GAF argues that, based on §§ 73.1020(a)(17) and 73.3516(e) of the

[1] There are also pending the following pleadings: (a) Petition for Leave to Amend, filed March 13, 1991, by Class; (b) Comments on Petition for Leave to Amend, filed March 26, 1991, by GAF; (c) Request for Return of Application as Unacceptable for Filing, filed May 30, 1991, by GAF; (d) Opposition to Request for Return of Application as Unacceptable for Filing, filed June 13, 1991, by Fidelio; (e) Reply to Opposition to Request for Return of Application as Unacceptable for Filing, filed June 24, 1991, by GAF; (f) Motion for Leave to File Response, filed June 28, 1991, by Fidelio; (g) Response to Reply to Opposition for Return of Application as Unacceptable for Filing, filed June 28, 1991, by Fidelio; (h) Motion to Strike Fidelio's Response and Opposition to Fidelio's Motion for Leave to File Response, filed July 11, 1991, by GAF; (i) Opposition to Motion to Strike, filed July 24, 1991, by Fidelio; (j) Petition to Deny, filed November 19, 1991, by GAF; (k) Opposition of The Fidelio Group, Inc. to Petition to Deny, filed January 17, 1992, by Fidelio; (l) Reply to Opposition to Petition to Deny, filed February 20, 1992, by GAF; (m) Petition for Leave to Amend, filed January 17, 1992, by Fidelio; (n) Opposition to Petition for Leave to Amend, filed February 20, 1992, by GAF; and (o) Reply by Fidelio to Opposition to Petition for Leave to Amend, filed March 10, 1992, by Fidelio; (p) Petition to Deny, filed April 30, 1991, by Class; (q) Petition to Deny, filed May 1, 1991, by Listeners' Guild, Inc. ("Guild"); (r) Petition to Deny, filed May 1, 1991, by the New York State Conference of Branches of the NAACP ("NAACP"); (s) Consolidated Opposition to Petitions to Deny, filed July 1, 1991, by GAF; (t) Reply to [Consolidated] Opposition to Petition[s] to Deny, filed August 21, 1991, by Guild; (u) Reply to Consolidated Opposition to Petitions to Deny, filed August 21, 1991, by Class; (v) Joint Request for Approval of Settlement Agreement, filed September 14, 1992, by GAF and NAACP; (w) Supplement to Joint Request for Approval of Settlement Agreement, filed September 22, 1992, by GAF; (x) Response of Listeners' Guild, Inc. to Joint Request for Approval of Settlement Agreement, filed September 29, 1992, by Guild; (y) Comments on Joint Request for Approval of Settlement Agreement, filed September 29, 1992, by Class; (z) Comments of the Fidelio Group, Inc. Concerning Joint Request for Approval of Settlement Agreement, filed October 5, 1992, by Fidelio; (aa) Consolidated Response and Motion to Strike, filed October 15, 1992, by GAF; (bb) Opposition to Motion to Strike, filed October 28, 1992, by Class.

NOTE: All pleadings, allegations, and agreements which relate to WNCN(FM)'s equal employment opportunity program and practices have been referred to the Mass Media Bureau's EEO

Commission's Rules,[2] Fidelio's deadline for filing an application mutually exclusive with the WNCN renewal application was the close of business on May 1, 1991. Because Fidelio's application was not filed until May 2, 1991, GAF argues that the application was untimely and should be dismissed.

5. In opposition, Fidelio argues that, based on the policy announced in *Fee Collection Program,* 5 FCC Rcd 3558 (1990), it was entitled to a one-day grace period within which to file its application. Thus, according to Fidelio, the deadline for filing its application was May 2, 1991. Because Fidelio tendered its application by the close of business on that date, Fidelio asserts that its application was timely filed and properly accepted for tender.

6. GAF replies that Fidelio's application does not qualify for the grace period referenced in *Fee Collection Program* because: (a) the Fidelio filing was not a time-critical application, and (b) Fidelio failed to timely file a back-up copy of its application with the Commission. According to GAF, a time critical application is a request for an authorization filed in response to a special "window" or "cut-off list" which establishes, with little advance warning, a brief and finite period within which to prepare and submit an application. However, Fidelio's application, according to GAF, was not filed in response to a special window or cut-off list. Rather, it was filed in response to a deadline established by operation of §§ 73.1020(a)(17) and 73.3516(e) of the Commission's Rules. Thus, GAF argues that Fidelio had notice for years in advance that WNCN's current license term would expire on June 1, 1991, and that an application mutually exclusive with the WNCN renewal application would be due no later than May 1, 1991. Consequently, GAF claims that Fidelio's filing is not the type of application for which the grace period was contemplated. GAF further asserts that Fidelio is not entitled to a grace period because it failed to file a back-up copy of its application with the Commission on May 1, 1991, along with proof that the application had been given to a courier service for next day delivery, as required by *Fee Collection Program.*[3]

7. In *Fee Collection Program* the Commission adopted a policy of requiring certain applications and accompanying fees to be submitted to a lockbox financial institution in Pittsburgh, Pennsylvania, rather than to the Commission's headquarters building in Washington, D.C. However, the Commission recognized that such a procedure might disrupt the normal filing habits of Washington-based entities. Specifically, the Commission acknowledged that a filer might lose control over its application when the application was delivered to an express carrier or courier for delivery to the bank, and, even if the application were sent in sufficient time to expect timely delivery, intervening events might result in loss or late delivery of the application to the bank.

8. Accordingly, the Commission created a one-day grace period for the filing of time critical applications. The Commission defined time critical applications as:

> requests for FCC authorizations that must be filed by a specific deadline or be dismissed as untimely. That is, applications filed in response to a "window" or a "cut-off" list established by the Commission.

5 FCC Rcd at 3564.

The Commission also stated that delivery of the application to the lockbox bank on the next business day after the deadline date "shall constitute a timely filing of the application in accordance with the deadline established by the Commission." 5 FCC Rcd at 3565.

9. The Commission further established a back-up filing procedure allowing a filer to deliver an unofficial copy of its application on the official due date to the Commission's headquarters building in Washington, D.C. where it would be retained by the Office of the Secretary. The stated purpose of the back-up filing procedure was to provide the applicant with "evidence" of timely submission in the unlikely event its official filing was lost or delayed by the courier service entrusted to deliver the official filing to the lockbox bank in Pittsburgh.

10. The Commission subsequently clarified certain aspects of the new filing procedures in *Public Notice, Filing of Time Critical Feeable Applications,* 67 RR 2d 1127 (1990). Specifically, the Commission stated:

> For time critical, feeable broadcast . . . applications, heretofore filed in Washington, D.C., the Commission will accept as timely filed those applications stamped in by the lockbox bank (Mellon Bank in Pittsburgh) before 12 o' clock midnight the next business day following the *official* deadline or cut-off date established by the Commission.
>
> . . . .
>
> The Commission has not officially extended any deadline or cut-off dates it has established. It has, however, by applying a "mail box" rule, granted filers who are required to file in Pittsburgh one extra day for transportation.

Branch for Commission disposition. Any grant of GAF's renewal application will be conditioned on the Commission's resolution of the EEO allegations.

[2] Pursuant to § 73.1020(a)(17) of the Commission's Rules (1991 edition), the license term for radio stations authorized to serve communities in the State of New York expired on June 1, 1991. Section 73.3516(e) of the Commission's Rules states, in pertinent part:

> (e) An application for a construction permit for a new broadcast station . . . will not be accepted for filing if it is mutually exclusive with an application for renewal of an existing broadcast station unless it is tendered for filing by the end of the first day of the last full calendar month of the expiring license term.

[3] Fidelio further disputes GAF's allegations in a response to GAF's reply. However, the Commission's rules do not contemplate the filing of responses to replies, and Fidelio's Motion for Leave to File Response will be denied.

. . . .

> A back-up filing procedure has been established for *only* time critical, feeable broadcast . . . applications, previously filed in Washington, to provide "insurance" against loss or late filings.

67 RR 2d at 1127.

11. On reconsideration, the Commission further clarified that the back-up filing procedure is voluntary. *See Fee Collection Program,* 6 FCC Rcd 5919, 5921 (1991).

12. Turning to the instant case, since Fidelio was not required to comply with the back-up filing procedure because the procedure is permissive, Fidelio's decision not to submit an unofficial copy of its application to the Office of the Secretary on May 1, 1991, is a matter without consequence in this case. Therefore, GAF's arguments to the contrary will be rejected.

13. It also is clear that Fidelio's filing was a time critical application. It is irrelevant that the deadline for filing an application mutually exclusive with a renewal application was established by operation of law, rather than by a special filing window or cut-off list. Regardless of how long in advance Fidelio was aware of it, the deadline unquestionably constituted a date certain which, if breached, would have subjected Fidelio's application to dismissal. Because it is concluded that the Fidelio application was a time critical filing, Fidelio was entitled to avail itself of the grace period contemplated in *Fee Collection Program.* Moreover, given the Commission's unambiguous pronouncements that the grace period is an automatic entitlement and that receipt on the next business day after the official deadline "shall constitute" a timely filing, it is further concluded that Fidelio's application was timely filed and received at the Pittsburgh lockbox facility on May 2, 1992.

Petition to Deny Fidelio Application

14. On November 19, 1991, GAF petitioned to deny the Fidelio application. GAF contends that the Fidelio application should be rejected because Fidelio has failed to demonstrate that its proposal, if granted, would provide adequate coverage to the community of license. Additionally, GAF argues that the Fidelio application may not be granted without an environmental assessment.[4]

15. Specifically, GAF maintains that because Fidelio's antenna will be mounted on the Chrysler Building in midtown Manhattan in close proximity to windows and interior offices, individuals working inside the building may be exposed to radiofrequency ("RF") radiation in excess of American National Standards Institute ("ANSI") limits. Accordingly, GAF argues that before Fidelio may effectuate its proposal, protective measures must be taken to limit exposure to excessive RF radiation. However, if Fidelio takes appropriate measures to limit excessive RF radiation exposure, such corrective measures will create severe shadowing problems and impede Fidelio's ability to comply with § 73.315(a) of the Commission's Rules. Section 73.315(a) requires an FM broadcast station to place a minimum field strength of 3.16 mV/m over at least 80% of the residential area of the community of license. *See Naguabo Broadcasting Co.,* 68 RR 2d 1325, 1330 (Rev. Bd. 1991).

16. Fidelio counters that it is highly unlikely that any corrective measures will be necessary to limit RF radiation. However, assuming, *arguendo,* that such measures are required, Fidelio categorically denies GAF's claim that the resulting signal would be so distorted so as to reduce coverage below acceptable levels.

17. We believe that GAF's arguments have merit. Mounting an antenna on the face of a building is relatively unusual. In addition, the interactions between the building and the antenna configuration could have significant adverse effects on the station's radiation pattern and coverage of the community of license. However, it has been Commission policy not to require details of antenna construction or a measured radiation pattern prior to the filing of an application for covering license (e.g., for directional antennas), and we will not do so here. Nevertheless, we will require Fidelio to file an amendment containing a statement from an antenna manufacturer certifying that an omnidirectional antenna can be constructed that will provide omnidirectional service when mounted in the manner and under the circumstances proposed by Fidelio. The statement should, if possible, specify the likely form and size of the antenna. The amendment shall be filed with the Commission within 30 calendar days of the release of this *Order.* In addition, a city-coverage issue shall be specified against Fidelio.

18. GAF also argues in its Petition to Deny that Fidelio should be subject to environmental processing on two independent grounds. Specifically, GAF states that the Chrysler Building upon which Fidelio proposes to sidemount its antenna has been designated an historic landmark in the National Register of Historic Places, and, therefore, Fidelio's proposal may have a significant environmental impact under § 1.1307(a)(4) of the Commission's Rules.[5] In this regard, GAF maintains that Fidelio is not entitled to an exemption from environmental processing under the "antenna farm" provision of § 1.1306(b) (Note 3)[6] because: the only antennas presently mounted on

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[4] The GAF Petition to Deny also incorporates by reference GAF's Request for Return of [Fidelio's] Application as Unacceptable for Filing, discussed above.

[5] Section 1.1307(a)(4) requires the preparation of an Environmental Assessment for:

> Facilities that may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archaeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places.

[6] Section 1.1306 (Note 3) states:

> The construction of an antenna tower or supporting structure in an established "antenna farm": (i.e., an area in which similar antenna towers are clustered, whether or not such area has been officially designated as an antenna farm), will be categorically excluded [from environmental processing] . . . .

the Chrysler Building are relatively small, "whip-type" private radio antennas that are not visible from street level; Fidelio's proposed antenna would constitute the only broadcast antenna mounted on the Chrysler Building; Fidelio does not propose to construct a supporting tower; the antenna would likely be visible to pedestrians; and the antenna would interfere with the architectural integrity of the Chrysler Building. GAF also argues that the Fidelio application should be subject to environmental processing because it will cause exposure of workers or the general public to levels of RF radiation in excess of ANSI levels.

19. Fidelio responds that although it is far from clear whether formal environmental processing is required, Fidelio's application nonetheless provides sufficient information to effectively constitute an Environmental Assessment. Additionally, Fidelio maintains that given the size of its proposed antenna (several feet wide) and the height at which it will be mounted (nearly the length of three football fields above street level), it is difficult to understand what significant adverse impact the antenna might have on the Chrysler Building. Moreover, while Fidelio concedes that there are presently no other broadcast stations using the Chrysler Building, Fidelio argues that the Chrysler Building has played host to multiple TV and radio antennas in the past, none of which had any apparent adverse impact on the historic structure. Fidelio also claims that its sole voting principal is an urban planner by training and profession who is sensitive to architectural design.

20. Fidelio also responds that the chances of exposing the occupants of the Chrysler Building to excessive RF radiation will be minimal because its proposed antenna will be located no closer than four floors from the nearest occupied office. Moreover, the exterior of the Chrysler Building is constructed of materials such that the structure itself will act as an RF shield, thereby preventing excessive amounts of radiation from penetrating. Additionally, Fidelio states that it is committed to making appropriate measurements upon installation of its equipment and taking any corrective steps necessary.

21. We believe that Fidelio's proposal may have a significant environmental effect, for which an Environmental Assessment ("EA") must be prepared, because it contemplates the sidemounting of a broadcast antenna on a building which has been designated as an historic landmark. Thus, the proposal falls squarely within § 1.1307(a)(4) of the Commission's Rules. The proposal is not categorically excluded from environmental processing under 1.1306(b)(Note 3) because the Chrysler Building is not an established "antenna farm" for broadcast antennas. In this regard, the broadcast antenna which Fidelio proposes to sidemount on the building differs from the private radio antennas presently located on the structure. Furthermore, Fidelio does not propose to construct a supporting tower for its antenna.

22. There also is another, independent ground for requiring environmental processing. Given the location of Fidelio's proposed antenna relative to occupied offices within the Chrysler Building, and the unique design of the skyscraper and indeterminate form of Fidelio's antenna configuration, we believe that Fidelio's proposal would expose members of the public to excessive RF radiation unless corrective measures are taken. Those corrective measures shall be specified in an EA.

23. Accordingly, a contingent environmental issue shall be specified below, and Fidelio shall prepare and submit an EA containing the information required in § 1.1311 of the Commission's Rules. The EA shall be directed to the Presiding Administrative Law Judge and filed with the Commission within 30 days of release of this *Order*. In addition, a copy shall be served on the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of § 1.1308. The comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its review of the EA, that Fidelio's proposal will not have a significant impact on the quality of the human environment, the contingent environmental issue shall be deleted, and the Presiding Administrative Law Judge shall thereafter not consider the environmental effects of the proposal. *See* § 1.1308(d).

Fidelio Amendment

24. On January 17, 1992, Fidelio petitioned for leave to amend its application to correct a discrepancy in the antenna height specified in its application. Fidelio states that the antenna height initially specified in its application did not accurately reflect the intended location of its proposed antenna on the Chrysler Building. Fidelio attributes the discrepancy to "miscommunication" of information between the Chrysler Building's engineer and Fidelio's consulting engineer. Fidelio notes that the amendment does not effect a change in the geographic coordinates or coverage specified in its application.

25. GAF opposes Fidelio's amendment. GAF argues that the amendment would, in part, raise the height of Fidelio's antenna by 128 feet, thereby placing it approximately 12 stories higher on the Chrysler Building than originally proposed. Consequently, GAF maintains that the amendment is far from a mere "housekeeping" matter; rather, it represents an impermissible attempt to cure an acceptability defect. GAF also argues that the amendment must be rejected because it was filed some six-months beyond the amendment-as-of-right date and, therefore, is grossly untimely. GAF further states that there is no good cause for acceptance of the amendment.

26. There is good cause to accept Fidelio's amendment. The amendment merely seeks to rectify a discrepancy in the height of Fidelio's antenna caused by miscommunication of information. The amendment specifies the position on the Chrysler Building which is actually available to Fidelio for Fidelio's proposed antenna. The higher elevation of Fidelio's proposed antenna is offset by a reduction in Fidelio's proposed effective radiated power. Although Fidelio's untimely amendment, filed January 17, 1992, will be accepted, no comparative advantage gained by this amendment will be allowed.

Petitions to Deny GAF Application

Class Petition

27. On April 30, 1991, Class filed a petition to deny the GAF renewal application. Class claims that GAF lacks the requisite character qualifications to remain a licensee because of misconduct which resulted in the criminal convic-

tions of GAF's parent company, GAF Corporation, and a principal thereof, James T. Sherwin ("Sherwin"), for violating federal securities and anti-fraud laws. Class further argues that the subsequent reversal of those convictions does not eliminate serious questions about GAF's fitness to continue operating Station WNCN(FM).

28. The Class petition is without merit. In *GAF Corporation,* 7 FCC Rcd 3225 (1992), the Commission definitively ruled that the reversal of the convictions of GAF Corporation and Sherwin eliminated questions about GAF's fitness to be a licensee. The Commission stated that the reversal:

> nullifies any earlier finding of criminal misconduct on their part. Therefore, we are not faced with an ultimate adjudication of relevant non-FCC misconduct by an appropriate trier of fact. Accordingly, consistent with [our policy statements on character qualifications], consideration of the alleged misconduct and its effect on the qualifications of the applicants in this proceeding is not warranted.

7 FCC Rcd at 3230 (footnote omitted).

29. Moreover, the Commission specifically stated that its decision in *GAF Corporation,* rejecting arguments that the criminal proceeding has an adverse effect on GAF's character, is dispositive of the matters raised in the instant Class petition to deny. 7 FCC Rcd at 3232, n.28. Accordingly, the Class petition will be denied.

Guild Petition

30. On May 1, 1991, Guild filed a petition to deny the GAF application on a number of grounds. Guild is a not-for-profit corporation organized and existing under the laws of the State of New York. According to an accompanying affidavit of the organization's President, David Malamud, Guild's members, as well as its directors and officers, are listeners of WNCN(FM) who reside in the New York City metropolitan area, the community served by WNCN(FM). Accordingly, Guild claims standing as a party-in-interest. Guild's allegations will be considered because the organization has adequately demonstrated that it has petitioner status. *See American Legal Foundation v. FCC,* 808 F.2d 84 (D.C. Cir. 1987).

31. Initially, Guild, like Class, argues that a hearing is warranted on GAF's basic character qualifications despite the reversal of the convictions of GAF Corporation and Sherwin. This argument will be rejected for the same reason that the Class petition is being denied. As the Commission stated in *GAF Corporation:*

> [i]n the absence of an ultimate conviction for unlawful criminal conduct, we believe it would be inappropriate for us to attempt to assess and resolve questions of federal law, and testimony and evidence presented in regard thereto, which are outside our principal area of jurisdiction.

7 FCC Rcd at 3231.

32. Guild also contends that "its rights have been violated, and the Commission's processes have been abused" because GAF's use of the name "WNCN Listeners' Club" for the station's promotional organization is confusingly similar to the Guild's own name. In its Consolidated Opposition, GAF asserts that the dispute over any purported similarity is a matter involving private commercial property rights and, as such, is of no consequence to the Commission.

33. The Commission does not adjudicate intangible property rights. *See e.g., Broadcast Call Sign Assignments,* 54 RR 2d 1492 (1983), *recon. denied,* 56 RR 2d 540 (1984) (Commission will not entertain disputes over station call signs because, in part, there are adequate judicial remedies). Additionally, Guild's accusation, that GAF has somehow abused the Commission's processes on the basis of the name that GAF has given to its listener organization, is totally unsupported and frivolous.

34. Guild also claims, based on its examination of Station WNCN(FM)'s issues/programs lists during the last license term, that GAF's purported compliance with the Commission's policies on public affairs programming is a sham. Specifically, Guild maintains that GAF has provided very little public affairs programming on WNCN(FM); it has confined what little public affairs programming it does provide to "graveyard" hours; and it has made only minimal efforts at ascertaining the needs and interests of the community.

35. GAF counters that licensees are afforded broad discretion to determine the nature and extent of their non-entertainment programs. GAF further argues that the Commission's rules require only that broadcasters place in their public files each quarter a list of programs reflecting the station's most significant treatment of community issues during the preceding three-month period. Thus, according to GAF, issues/programs lists are intended to be merely representative of a station's efforts to meet its public service obligations, not an exhaustive record of such efforts. In any event, GAF stresses that Guild has completely failed to meet the heavy burden it bears of showing that GAF has abused its discretion in meeting its public service obligations.

36. In 1981, the Commission determined that it would no longer dictate to licensees how to ascertain what issues warrant attention or the types of non-entertainment programs that licensees must broadcast in order to satisfy their public service programming obligations. *Deregulation of Radio,* 84 FCC 2d 968 (1981), *recon. granted in part,* 50 RR 2d 93 (1981), *aff'd in part and remanded in part sub nom. Office of Communications of United Church of Christ v. FCC,* 707 F.2d 1413 (D.C. Cir. 1983). Consequently, there are no mandatory issues that a station must address in its non-entertainment programming; there is no minimum amount of public service programming that a station must air; and there is no specific time period during which such programming must be broadcast. *Philadelphia Television Station,* 67 RR 2d 1567 (1990). Furthermore, § 73.3526(a)(9) of the Commission's Rules requires that a licensee place in its public file each calendar quarter an issues/programs list containing what is essentially a sampling -- not a comprehensive compilation -- of the station's public service programming during the preceding three-month period.

37. In order to make out a *prima facie* case of licensee abuse of its public service programming obligations, a petitioner must demonstrate that the licensee was unreasonable in its selection of issues or the licensee failed to provide issue-responsive public service programming. *See Silver King Broadcasting of Vineland, Inc.,* 5 FCC Rcd 7499 (1990). In the instant case, Guild has done neither. Although Guild argues that GAF's list of ascertained issues has been relatively static over the license term, Guild does

not allege that GAF acted unreasonably in its selection of those issues. Nor does Guild allege that WNCN(FM) has failed to provide issue responsive programming. Rather, Guild focuses almost exclusively on the quantity and scheduling of WNCN's non-entertainment programming, matters which are within GAF's discretion and, standing alone, do not raise a *prima facie* case for abuse of the licensee's public service programming obligations. *See Deregulation of Radio*, 84 FCC 2d 968 (1981). Accordingly, Guild's petition, to the extent that it seeks denial of the GAF renewal application based on claims of programming deficiencies, will be rejected.

Conclusion

38. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

39. ACCORDINGLY, IT IS ORDERED, That, pursuant to § 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent *Order*, upon the following issues:

1. If a final Environmental Impact Statement is issued with respect to Fidelio in which it is concluded that the proposed facilities will have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301 - 1319.

2. To determine whether Fidelio's application complies with § 73.315(a) of the Commission's Rules, and, if not, whether a waiver is warranted.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which, if any, of the applications should be granted.

40. IT IS FURTHER ORDERED, That the Petition for Leave to Amend, filed March 13, 1992, by Class IS GRANTED, and the amendment IS ACCEPTED to the extent indicated above.

41. IT IS FURTHER ORDERED, That the Request for Return of [Fidelio's] Application as Unacceptable for Filing, filed May 30, 1991, by GAF IS DENIED.

42. IT IS FURTHER ORDERED, That the Petition to Deny [Fidelio's application], filed November 19, 1991, by GAF, IS GRANTED TO THE EXTENT INDICATED ABOVE AND DENIED IN ALL OTHER RESPECTS.

43. IT IS FURTHER ORDERED, That the Petition for Leave to Amend, filed January 17, 1992, by Fidelio IS GRANTED, and the amendment IS ACCEPTED to the extent indicated above.

44. IT IS FURTHER ORDERED, That the Petition to Deny [GAF's application], filed April 30, 1991, by Class, IS DENIED.

45. IT IS FURTHER ORDERED, That the Petition to Deny [GAF's application], filed May 1, 1991, by Guild IS DENIED TO THE EXTENT INDICATED ABOVE. *See* "Note" at footnote 1, above.

46. IT IS FURTHER ORDERED, That any grant of GAF's application for renewal of license of Station WNCN(FM) SHALL BE CONDITIONED on final Commission disposition of the staff inquiry into WNCN(FM)'s equal employment opportunity program and practices. *See* "Note" at footnote 1, above.

47. IT IS FURTHER ORDERED, That FIDELIO SHALL FILE, in accordance with ¶ 23, above, within 30 days of release of this *Order*, an Environmental Assessment containing the information required in § 1.1311 of the Commission's Rules.

48. IT IS FURTHER ORDERED, That FIDELIO SHALL FILE, in accordance with ¶ 17, above, within 30 days of the release of this *Order*, an amendment containing the referenced technical information about its proposed antenna.

49. IT IS FURTHER ORDERED, That a copy of EACH DOCUMENT filed in this proceeding subsequent to the date of adoption of this *Order* SHALL BE SERVED on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of EACH AMENDMENT filed in this proceeding subsequent to the date of adoption of this *Order* SHALL BE SERVED on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, 1919 M Street, N.W., Suite 350, Washington, D.C. 20554.

50. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the APPLICANTS and any party respondent herein SHALL FILE with the Commission, pursuant to § 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this *Order*, in triplicate, a WRITTEN APPEARANCE stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this *Order*.

51. IT IS FURTHER ORDERED, That the APPLICANTS herein SHALL GIVE NOTICE of the hearing within the time and in the manner specified in § 311(a)(2) of the Communications Act of 1934, as amended, and § 73.3594 of the Commission's Rules, and SHALL ADVISE the Presiding Judge of the publication of such notice, as required by § 73.3594(g) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-53

In re Applications of

KR Partners (hereafter "KR") — File No. BPH-911001MB

KES COMMUNICATIONS, INC. (hereafter "KES") — File No. BPH-911903MH

LORI LYNNE FORBES (hereafter "Forbes") — File No. BPH-911004MH

For Construction Permit
for a New FM Station on Channel
256C in Waimea, Hawaii

HEARING DESIGNATION ORDER

Adopted: March 1, 1993; Released: March 16, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

Preliminary Matters. On June 23, 1992, KR filed a petition for leave to amend its application. The amendment: (i) notes the withdrawal of George Handgis ("Handgis") as the source of KR's financing; (ii) revises the estimate of construction costs, and (iii) submits a new source of financing. The petition indicates that good cause exists for acceptance of the amendment, citing *Erwin O'Connor Broadcasting,* 22 FCC 2d 140 (Rev. Bd. 1970), because: (i) the amendment was pursued with due diligence; (ii) it was not required by the voluntary act of the applicant; (iii) it will not necessitate modification or addition of issues or parties; (iv) it will not disrupt the orderly conduct of the hearing nor necessitate an additional hearing; (v) it will not unfairly prejudice the other parties; and (vi) it will not cause the applicant to gain any comparative advantage.

2. On July 28, 1992, Forbes filed an opposition to KR's petition for leave to amend stating that, with respect to the source of financing, KR's amendment has not been timely filed, and that insufficient information has been provided to warrant the formal acceptance of the amendment. Because the amendment was submitted after the last day for submitting amendments as of right, states Forbes, it is not acceptable at all under the reasoning of *Radio Representatives,* 5 FCC Rcd 3064 (M.M. Bur. 1990), since it pertains to the "grantability" of KR's application and it was not timely filed. Forbes also cites *Evans Broadcasting,* 5 FCC Rcd 1675 (M.M. Bur. 1990), in which the Commission rejected the applicant's amendment to its financial qualifications, finding that an amendment filed after the period for filing amendments as of right, even if it purported to reestablish an applicant's financial "grantability" qualifications, is not acceptable. Forbes also claims that "good cause" for acceptance of KR's amendment has not been established. Forbes alleges that no documentation has been provided evidencing the adequacy of Handgis initial financial assurances to KR, the "withdrawal" of Handgis' alleged assurances to KR or the existence of assurances from BDC Services, Inc. ("BDC"). Lacking evidence establishing the sufficiency of KR's initial financial qualifications, it is impossible for the Commission to establish that KR initially was financially qualified which, under *Albert E. Gary,* 5 FCC Rcd 6235, 6236 (Rev. Bd. (1990), and *Pepper Schultz,* 5 FCC Rcd 3273 (1990), prevents acceptance of its instant amendment. Additionally, Forbes states that, without providing evidence of the alleged assurances provided by BDC, KR has failed to make the requisite full financial showing which, under *Radio Representatives,* is required in order to permit favorable consideration of KR's request for the acceptance of its late-filed amendment. Forbes further alleges that since the amendment apparently was not diligently filed, that aspect of KR's amendment which seeks to reduce its budget estimates also cannot be accepted and that KR has presented no facts or basis supporting acceptance of its revised amendment. In short, Forbes alleges that: (i) KR's amendment represents an attempt to change and bolster its basic qualifications in a deficient untimely manner; (ii) it has failed to establish good cause for the amendment; and (iii) it failed to provide information necessary to evaluate the adequacy of the amendment.

3. 47 C.F.R. § 73.3522(a) (6) indicates that amendments filed after the period for filing amendments as of right "will be considered only upon a showing of good cause for late filing or pursuant to § 1.65 or § 73.3514." The elements of good cause are those stated in *Erwin O'Connor* and cited by KR. While the Review Board has held that "[i]nitial financial qualifications are an important ingredient to a good cause showing for subsequent financial amendments," *Albert E. Gary,* 5 FCC Rcd 6235, 6236 (Rev. Bd. 1990) and the cited cases, we believe that the cases cited by Forbes do not warrant a finding that KR lacks good cause to amend its application.[1]

4. Rather, we believe that KR has satisfied the six-part *O'Connor* good cause standard for its financial certification. First the amendment was pursued with due diligence: KR

[1] In *Radio Representatives,* applicant Irene Escalante stated in her original application that she was not financially qualified, then later attempted to amend after the date for amending as of right to demonstrate that she was financially qualified. That is not the case here. In *Evans,* applicant Evans Broadcasting withdrew its initial financial certification on April 21, 1988 and, over eight months later, attempted to re-certify its financial qualifications using 47 C.F.R. § 1.65. We held in *Evans* that

> Section 1.65 requires applicants to maintain the continuing accuracy of the information contained in their applications. This rule does not, however, require the acceptance of such amendments when, as in the instant case, they cure an acceptability or grantability defect in the underlying application and the period for filing amendments as of right has already lapsed ... (w)e will

learned of Handgis' decision by his letter dated April 28, 1992, and received shortly thereafter. Therefore, the June 25 petition for leave to amend was filed with due diligence, especially in light of the fact that alternative financing had to be sought and achieved in a very short amount of time. Second, the amendment is not required by the voluntary act of the partnership. Rather, financial qualifications are a basic qualifying matter, and it was incumbent upon KR to file this amendment. Third, since the proceeding has not yet been designated for hearing, it will not necessitate the modification or addition of issues or parties. Fourth, it will not disrupt the orderly conduct of the hearing or necessitate any additional hearings. Fifth, the fact that the partnership has attempted to qualify itself financially by virtue of this amendment cannot unfairly prejudice any other party to the proceeding. Sixth, because the amendment addresses KR's basic qualifications to be a Commission licensee, it will not have any effect on the comparative merits of the various applicants. Furthermore, Forbes has provided no evidence that KR's original financial certification was erroneous or untrue. Forbes merely points to language in the amendment stating that prior to the April 28 letter withdrawing his offer of financing, "Ms. O'Connor had discussions with Mr. Handgis concerning doubts about his continued support, but not until its receipt was she finally advised that we could not rely upon his support." This does not countermand the showing demonstrated by KR with respect to the financial certification.

5. However, we believe that KR has not demonstrated good cause for its revised construction cost estimates. We have no demonstration for example, that KR acted with due diligence to revise those figures (or even what generated the revision), and the revision certainly was a voluntary act on KR's part. Therefore, we do not believe that acceptance of the construction cost revision is appropriate, and that portion of KR's amendment must be returned. With the acceptance of KR's new financial certification and return of the construction cost estimates, KR's certification does not meet its stated cost requirements. Therefore, a financial issue will be added.

6. *Other Matters.* Section II, Item 6 (old form) of FCC Form 301 (June 1989) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. KR has not completed Item 4 correctly. KR's application gives a post office box number as the residence address for it. Accordingly, KR must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administration Law Judge after this Order is released.

7. Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to KR, whether the applicant is financially qualified.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That, as indicated above, the petition for leave to amend, filed by KR on June 3, 1992, IS GRANTED IN PART AND DENIED IN ALL OTHER RESPECTS, and the amendment IS ACCEPTED IN PART AND RETURNED IN PART.

11. IT IS FURTHER ORDERED, That the opposition to KR's petition for leave to amend, filed by Forbes, on July 28, 1992, IS GRANTED IN PART AND IS DENIED IN ALL OTHER RESPECTS.

12. IT IS FURTHER ORDERED, That KR shall submit an amendment in accordance with paragraph 6 above to the presiding Administrative Law Judge within 30 days of the release of this Order.

13. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

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not allow applicants, under the guise of a 1.65 reporting amendment, to circumvent deadlines established for the filing of curative amendments per §73.3522. Based on the foregoing, we find that Evans has failed to establish good cause for acceptance of its December 16, 1988 amendment.

5 FCC Rcd at 1677. Finally, both *Gary* and *Schultz* involved *post*-designation attempts to amend financial qualifications when the documentary evidence presented at hearing regarding the initial certification called into question "the basic condor and substance behind the original certification." 5 FCC Rcd at 6236. Here, as discussed further below, Forbes has presented no evidence that KR's original financial certification was inaccurate.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (*see* Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (*see* Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (*Report and Order* in Gen. Doc. 90-264), 6 FCC Rcd 175, 160-1, 166, 168 (1990), *on reconsideration*, 6 FCC Rcd 3403, 3404 & n.3, Appendix paras 3 & 5 (1991).

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-52

In re Applications of

BOARD OF VISITORS OF JAMES MADISON UNIVERSITY (hereafter "JMU") — File No. BPED-91101MA

COMMUNITY EDUCATIONAL SERVICE COUNCIL, INC. (hereafter "CESCI") — File No. BPED-920511MB

For Construction Permit for a New FM Noncommercial Educational Station on Channel 278A in Crozet, Virginia

HEARING DESIGNATION ORDER

Adopted: March 1, 1993; Released: March 15, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM noncommercial educational station.

2. *Preliminary Matter.* On October 21, 1992, JMU filed a petition to deny the application of CESCI.[1] JMU's petition is essentially a petition to specify issues. Since the Commission's *Report and Order* in re *Revised Procedures for the Processing of Contested Broadcasting applications; Amendments of Part I of the Commission's Rules,* 72 FCC 2d 202, 45 RR 2d 1220 (1979), directed the deletion of all issue pleadings in pending cases, the matters sought to be raised in this petition have not been considered. Accordingly, an opportunity to raise the allegation contained therein will be afforded the parties post-designation pursuant to Section 1.229.

3. JMU requests a waiver of Section 73.1125 of the Commission's Rules to permit it to operate its proposed new noncommercial FM station as a satellite of station WMRA(FM), Harrisonburg, Virginia. JMU notes that at present, listeners in the Crozet area are on the fringe of public radio service and are only able to receive a poor signal, if any signal at all. There has been community interest in receiving JMU programing because Crozet is inadequately served by public radio. JMU also notes that it is committed to the goal of providing high quality noncommercial programming even if a full schedule of such programming could not ordinarily be independently produced by separated FM stations throughout the region. A waiver of the main studio rule would be in the public interest, according to JMU, because the proposed satellite station at Crozet would fulfill an otherwise unmet programming need. Additionally, JMU indicates that it will determine local needs in Crozet through several means: (i) JMU maintains a community advisory board which provides recommendations on community needs and programming directly to WMRA's management, and it will appoint at least one resident of Crozet to the advisory board, thus permitting direct input from Crozet into the ascertainment and program planning process; and (ii) JMU also intends to conduct its own ascertainment study in the Crozet area each year.

4. JMU further notes that community needs of Crozet will be met by the station's programming. WMRA(FM) currently broadcasts local, regional, national news and public affairs segments in its "Morning Edition" programming. JMU states that WMRA has always attempted to cover the entire region in its news and public affairs programming, and its ability to do so will be enhanced by the addition of a news stringer in Crozet. Moreover, WMRA(FM) will transmit public service announcements for Crozet and the surrounding region. JMU also plans to provide coverage of significant events in Crozet and surrounding areas, including coverage of cultural events, political campaigns, and election results. Finally, JMU notes that it will maintain a public inspection file at the Jefferson Madison Public Library in Crozet and provide toll-free telephone access from Crozet to the main studio at WMRA(FM) in Harrisonburg.

5. A "satellite" station has been defined by the Commission as one "operating on a Channel specified in the rules, but one which usually originates no local programming... It rebroadcasts the programming of the parent station." *Multiple Ownership Rules,* 3 RR 2d 1554, 1562 (1964). In the past, the Commission has recognized the economic benefits of centralized operations for noncommercial educational stations, such as that presented here. *See Memorandum Opinion and Order* in MM Docket 86-406, 3 FCC Rcd 5024, 5027 (1988). Because of the limited funding available to these stations, we have granted waivers to state and regional public television and radio networks to operate "satellite" stations. *Nebraska Educational Television Commission,* 4 RR 2d 771 (1956), and *Sound of Life, Inc.,* 4 FCC Rcd 8273 (1989). However, these stations have not been permitted to ignore local service obligations. *See Georgia State Board of Education,* 70 FCC 2d 948 (1979). The Commission has never "indicated, directly or indirectly, that licenses were granted to state educational networks for the purpose of providing statewide service and not local services." *Id.,* at 956. Waivers generally have been granted "only upon a showing that the local community would be served... [and] such stations will be subject to the local/toll free telephone requirements." 3 FCC Rcd at 5027. *See also* 47 C.F.R. § 73.1125(c).

[1] A motion for acceptance of untimely filing and an opposition to petition to deny was filed simultaneously by CESCI, on December 11, 1992. JMU filed a reply on December 22, 1992.

6. JMU has established that even without a main studio in the service area of the proposed station, it will determine local needs and respond to them in its programming. Accordingly, JMU's request for waiver of 47 C.F.R. § 73.1125 will be granted.

7. Neither of the applicants has indicated that an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency, and thus better serve the public interest. *Granfalloon Denver Education Broadcasting, Inc.*, 43 Fed. Reg. 49,560, published October 24, 1978. In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a time-sharing issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the Hearing, from participating in negotiation with a view toward establishing a share-time arrangement.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine: (a) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest, and if so the terms and conditions thereof; (b) the extent to which each of the proposed operations will be integrated into the overall cultural and educational operations and objectives of the respective applicants; and (c) whether other factors in the record demonstrate that the applicant will provide a superior FM educational broadcast service.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if either.

10. IT IS FURTHER ORDERED, That the petition to deny filed by JMU on October 21, 1992 IS HEREBY DISMISSED.

11. IT IS FURTHER ORDERED, That JMU'S request for waiver of section 73.1125 of the Commission's Rules IS HEREBY GRANTED.

12. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-51

In re Applications of

MARTHA J. HUBER (hereafter "Huber")	File No. BPH-911114ME
ADAMS RIB, INC. (hereafter "Adams Rib")	File No. BPH-911115MA
RITA REYNA BRENT (hereafter "Brent")	File No. BPH-911115MC
D.E.K.W. COMMUNICATIONS, INC. (hereafter "D.E.K.W.")	File No. BPH-911115MF
MIDAMERICA ELECTRONICS SERVICE, INC. (hereafter "Midamerica")	File No. BPH-911115ML
STATON COMMUNICATIONS, INC. (hereafter "Staton")	File No. BPH-911115MU

For Construction Permit for a
New FM Station on Channel 234A
in New Albany, Indiana

HEARING DESIGNATION ORDER

Adopted: March 3, 1993; Released: March 15, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Adams Rib.* An engineering review of Adams Rib's application reveals that a discrepancy exists between the antenna radiation center height above average terrain (HAAT) given in Section V-B, Item 7(b)(3) of FCC Form 301 (June 1989) and the average HAAT obtained from the radial values in Item 18. Item 7(b)(3) states that the HAAT is 138 meters while the average of the radials in Item 18 is 135 meters. The use of either value for the HAAT does not cause the application to violate any rule section. Consequently, this discrepancy is not an acceptability defect and may be corrected by an amendment. Accordingly, Adams Rib must file an amendment which gives the correct HAAT with the presiding Administrative Law Judge after this Order is released.

3. Section V-B, Item 26 of FCC Form 301 (June 1989) requests whether a grant of the application would fall under Section 1.1307 of the FCC rules, such that it may have a significant environmental impact. Adams Rib responded in the affirmative while Exhibit EE-5 attached to the June 25, 1992 amendment indicates that there will be no significant environmental impact. Accordingly, Adams Rib must file an amendment that corrects this discrepancy with the presiding Administrative Law Judge after this Order is released.

4. *Brent.* Section II, Item 8(b) of FCC Form 301 (June 1989) requests whether any member of the applicant's immediate family has any interest in or connection with any other broadcast station, pending broadcast application or newspaper in the same area as the proposed station. Brent did not complete Item 8(b). Accordingly, Brent must file an amendment which responds to Section II, Item 8(b) and provides any necessary exhibit with the presiding Administrative Law Judge after this Order is released.

5. *D.E.K.W.* Dwayne E.K. Watkins, president and director of D.E.K.W., is also a senior account executive at station WGZB(FM), Corydon, Indiana. Additionally, David S. Greenberg, the sole non-voting shareholder of D.E.K.W., is vice president and director of Power Communications, Inc., the licensee of WGZB(FM). Mr. Watkins and Mr. Greenberg have indicated their intent to terminate their relationships with WGZB in the event of grant of the referenced application. Their employment may represent a potential violation of the Commission's cross-interest policy. *See Reexamination of the Commission's Cross-Interest Policy,* 4 FCC Rcd 2208 (1988). Accordingly, in the event of grant of D.E.K.W.'s application, Mr. Watkins and Mr. Greenberg will be required to sever all connections with station WGZB prior to the commencement of program test authority.

6. *Other Matters.* Adams Rib petitioned for leave to amend its application on June 25, 1992, after the last date for filing amendments as of right. This amendment was accompanied by the good cause showing required by 47 C.F.R. § 73.3522(a)(2) and, consequently is accepted for filing. Midamerica amended its application on the date shown below. This amendment was filed after the last date for filing amendments as of right and under Section 1.65 of the Commission's Rules, is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Adams Rib	June 25, 1992
Midamerica	January 29, 1993

7. Data submitted by the applicants indicate that there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which

[1] Mutually exclusive applicant Barbara Ruth Zarris, (BPH-911115MD), was dismissed on August 31, 1992, for failure to pay a hearing fee.

would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That, in accordance with paragraphs 2 and 3 hereinabove, Adams Rib shall submit an amendment which (i) gives the correct HAAT, and (ii) corrects the discrepancy in Section V-B, Item 26. The amendment shall be submitted to the presiding Administrative Law Judge within 30 days of the release of this Order.

11. IT IS FURTHER ORDERED, That, in accordance with paragraph 4 hereinabove, Brent shall submit an amendment which contains the information required by Section II, Item 8(b) of FCC Form 301 to the presiding Administrative Law Judge within 30 days of the release of this Order.

12. IT IS FURTHER ORDERED, That in the event of grant of D.E.K.W.'s application, Dwayne E.K. Watkins and David. S. Greenberg will be ordered to sever all connections with station WGZB(FM), Corydon, Indiana, prior to commencement of program test authority.

13. IT IS FURTHER ORDERED, That the June 25, 1992 petition for leave to amend filed by Adams Rib IS GRANTED, Adams Rib's corresponding amendment IS ACCEPTED to the extent indicated herein, and the January 29, 1993 amendment filed by Midamerica IS ACCEPTED to the extent indicated herein.

14. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
March 8, 1993

Released: March 15, 1993

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Allied Media of Georgia, Inc.
Radio Station WGGA-FM
P.O. Box 1318
Gainesville, GA 30503

Dear Sir or Madam:

This is a Notice of Apparent Liability for a forfeiture of seventeen thousand five hundred dollars ($17,500) issued pursuant to Section 503(b) of the Communications Act of 1934, as amended. This action is taken under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

On January 27, 1992, the Commission sent you a letter of inquiry requesting information as to whether Station WGGA-FM,[1] Cleveland, Georgia, has a studio capable of functioning as a main studio within the station's principal community contour, as required under Section 73.1125 of the Commission's Rules. Additionally, we asked you for a list of full or part-time employees who work at the main studio, the local or toll-free telephone number for residents of the community of license, and the location of the public file.

On August 7, 1992, we received your Response to the inquiry. You state that the Cleveland, Georgia, "main" studio is located at its transmitter site and that there are no employees at this studio on a full-time basis. You inform us that you have retained a contract engineer who works 24 hours a month. He conducts a weekly maintenance inspection of the "main" studio. Periodically, the general manager and the operations manager visit this site. You admit that, prior to receiving our letter of inquiry, you did not have either a local telephone number or a toll-free number for residents of Cleveland. However, you have now acquired a local telephone number and state your intention to activate a toll-free telephone number on August 7, 1992. Similarly, when you received our letter of inquiry, you were not maintaining a public file within your community of license as required by Section 73.3526 of the Commission's Rules. Instead, you report having a public inspection file at your Gainesville, Georgia, "auxiliary" studio. You indicate that as of August 3, 1992, you have placed a copy of the public file in the White County Public Library located in Cleveland, Georgia.

The main studio rule, 47 C.F.R. § 73.1125, requires that each licensee maintain a main studio within its principal community contour. Additionally, the Section requires licensees to maintain a "meaningful management and staff presence" at its main studio location. *Main Studio and Program Origination Rules (Clarification)*, 3 FCC Rcd 5024 (1988). In *Jones Eastern of Outer Banks, Inc.*, 6 FCC Rcd 3615 (1991), *clarified*, 7 FCC Rcd 6800 (1992), the Commission defined a minimally acceptable "meaningful presence" as full-time managerial and full-time staff personnel. It further stated that there must be "management and staff presence" on a full-time basis during normal business hours to be considered 'meaningful.'" 6 FCC Rcd at 3616 n.2; *see also* 7 FCC Rcd at 6800 n.4. Although stations with only one studio and four or fewer employees need not limit their employees' ability to leave the studio to conduct station business, the main studio must remain attended during normal business hours. Management personnel need not be "chained to their desks" during normal business hours, but must "report to work at the main studio on a daily basis, spend a substantial amount of time there and . . . use the studio as a 'home base.'" *Jones Eastern Clarification*, 7 FCC Rcd at 6802.

On the basis of your response, it appears that you are in violation of Section 73.1125(a). It appears that you do not maintain a "meaningful management and staff presence" at the main studio. Neither employing a contract engineer to perform weekly maintenance inspections for 24 hours a month, which generally amounts to six hours a week, nor having the general manager or the operations manager visit the site "periodically," is equivalent to the rule's requirement of having employees work at the "studio on a daily basis, spend a substantial amount of time there and . . . use the studio as a 'home base.'" Thus, it appears you are in violation of the main studio rule.

It appears you have also violated Sections 73.1125(c) and Section 73.3526(d) of the Commission's Rules. Under Section 73.1125(c), the Commission requires licensees whose main studios are located outside the community of license to provide local telephone numbers or toll-free numbers for residents of their communities of license if community residents would otherwise incur charges in telephoning the stations. Under Section 73.3526(d), the licensee must maintain its public inspection file in the community of license.

You violated Section 73.1125(c) because you failed to maintain a toll-free or local number for the residents of Cleveland, Georgia, from August 29, 1991, the date you acquired the station to August 7, 1992, the date you stated that the line would be activated. Similarly, you violated Section 73.3516(d) because you did not locate the public inspection file within the station's community of license from August 29, 1991, the date you acquired the station, to August 3, 1992, the date you made a duplicate file available for public inspection in Cleveland, Georgia. You have been, and remain in violation of Section 73.1125(a), the rule requiring maintenance of a main studio within the principal community contour, because you do not maintain a "meaningful management and staff presence" at the Cleveland facility.

[1] . While we are aware that the licensee has changed the radio station's call sign to WGZM-FM, we are referring to the station as WGGA-FM for consistency with the record compiled in this case.

Accordingly, you are hereby advised of your apparent liability for a forfeiture of seventeen thousand five hundred dollars ($17,500) for your apparent willful and repeated violations of Sections 73.1125 and 73.3526 of the Commission's Rules. The amount specified has been reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended, and the guidelines described in our *Policy Statement, Standards for Assessing Forfeitures,* 6 FCC Rcd 4695 (1991), *recon. denied,* FCC 92-212, (June 4, 1992).

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

Additionally, because it appears that you are still in violation of the main studio rule, Section 73.1125(a), you must take immediate remedial measures to bring yourself into compliance. Within thirty (30) days of the date hereof, you must provide documentation to this office outlining the steps you have taken to bring yourself into compliance. Since this is an ongoing violation, you are hereby notified that further similar forfeitures for additional periods of noncompliance may issue.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of WPNT, Inc.

Licensee of Station KHTK(FM)
Florissant, Missouri

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: March 8, 1993; Released: March 15, 1993

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration: (1) a Notice of Apparent Liability (NAL), issued on August 10, 1992, for twenty-five hundred dollars ($2,500) against WPNT, Inc. ("WPNT") licensee of Station KHTK(FM),[1] Florissant, Missouri; and, (2) a response to the Notice of Apparent Liability filed September 8, 1992, requesting rescission of the forfeiture.

2. The Notice of Apparent Liability was assessed for repeated violations of 18 U.S.C. Section 1343 of the United States Code. The Commission determined that Station KHTK(FM) had repeatedly aired a fraudulent solicitation for funds to replace its tower when insurance funds were going to be used for that purpose. The facts are set forth in full detail in the Notice of Apparent Liability and will not be repeated here.

3. In addition to reiterating arguments already addressed in the Notice of Apparent Liability, WPNT argued that the three cases cited in the Notice of Apparent Liability do not support the Commission's position, which is that success of the scheme is irrelevant to whether a violation was committed. *See United States v. Lemire,* 729 F.2d 1327, 1341 (D.C. Cir. 1983); *United States v. Hopkins,* 716 F.2d 739 (10th Cir. 1982), *rev'd in part and remanded for new trial,* 744 F.2d 716 (10th Cir. 1984) *(en banc); United States v. Bagdasian,* 291 F.2d 163 (1961). Instead, the licensee contended that the cases cited support its position that defendants must benefit from the scheme before being found guilty of committing a wire fraud violation. Second, it argued that the Commission violated the First Amendment because it found a wire fraud violation without requiring extrinsic evidence to prove intent.

4. We reject WPNT's contentions. It is irrelevant that defendants benefitted in the cited cases because success of the scheme is not required to prove a wire fraud violation. In *United States v. Bagdasian,* 291 F.2d 163, 164 (1961), the Fourth Circuit Court of Appeals specifically rejected the argument that an indictment was defective because it did not allege that the defendant converted money to his own use and stated that "this is not an essential part of the crime of devising a fraudulent scheme. . . ." In *United States v. Lemire,* 729 F.2d at 1341 (D.C. Cir. 1983) the court, citing *United States v. Schaeffer,* 599 F.2d 678 (5th Cir. 1979), stated that "success of scheme was not required." In *United States v. Hopkins,* 716 F.2d at 746 n.10 (10th Cir. 1982) *rev'd in part and remanded for new trial,* 744 F.2d 716 (10th Cir. 1984) *(en banc),* the court stated that the "actual defrauding of a particular victim is not crucial to a successful prosecution". Thus, the fact that WPNT donated the money to charity, instead of using it for its own purposes, is immaterial in determining whether there has been a violation.

5. Finally, we reject WPNT's contention that the Commission violated the First Amendment because it issued a forfeiture for wire fraud based on the announcement without requiring extrinsic evidence that the station intended to defraud or harm its listeners. WPNT advocates that a Section 1343 violation requires extrinsic evidence because such evidence is required in proving a news distortion or a hoax violation. *See e.g., Hunger in America,* 20 FCC 2d 143 (1969); *The Selling of the Pentagon,* 30 FCC 2d 150 (1971); *Broadcast Hoaxes,* 7 FCC Rcd 4106 (1992). But, the present situation involves a wire fraud violation, which does not require extrinsic evidence. Furthermore, the wire fraud cases cited as authority in WPNT's response do not apply this type of First Amendment analysis. Moreover, our conclusion that WPNT violated Section 1343 is not based on the announcement alone. As explained in the Notice of Apparent Liability, we considered the totality of circumstances before we found that WPNT had committed a Section 1343 violation. We considered WPNT's decision to air the announcement twelve days in a row, four times per day, and that WPNT failed to inform listeners that the announcement was a joke, despite the announcement's lack of reference or words indicating it was a joke even, apparently, once it began receiving listeners' donations.

6. We have reviewed the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended, and the *Policy Statement, Standards for Assessing Forfeitures,* 6 FCC Rcd 4695 (1991) *on recon.,* 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom. USTA v. FCC,* No. 92-1321 (D.C. Cir. filed July 30, 1992) and conclude that the amount of forfeiture assessed against WPNT in this proceeding is justified.

7. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED, that WPNT, Inc., licensee of KHTK(FM), Florissant, Missouri, FORFEIT to the United States the sum of twenty five hundred dollars ($2,500) for its willful violation of 18 U.S.C. Section 1343 of the United States Code. Payment of the forfeiture may be made by following the instructions on the enclosed form. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

[1] While we are aware that the licensee has changed the radio station's call sign to KXOK(FM), we are referring to the station as KHTK(FM) for consistency with the record compiled in this case.

FEDERAL COMMUNICATIONS COMMISSIONN

Roy Stewart, Chief
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of Madison
Communications, Inc.,
Athens, Alabama,
for a forfeiture

ORDER

Adopted: January 6, 1993; Released: March 9, 1993

By the Commission:

I. INTRODUCTION

1. Before the Commission is an Application for Review dated April 10, 1992, on behalf of Madison Communications, Inc. (Madison), Athens, Alabama. The application requests review by the Commission of $52,000 in monetary forfeiture penalties that had been issued by the Federal Communications Commission (FCC) staff to Madison, and a reduction "to not more than $26,000." As explained below, the Commission reduces those penalties.

II. BACKGROUND

2. On January 29 and 30, 1991, the FCC's Powder Springs Office monitored transmitters in Huntsville, Alabama, transmitting on 26 video and aural frequencies. It was determined that Madison was producing these transmissions and that it did not have FCC licenses to operate on the frequencies. On February 1 and 4, 1991, the FCC's Powder Springs Office issued to Madison 26 Notices of Apparent Liability for repeated violations of Section 301 of the Communications Act of 1934. 47 U.S.C. Section 301. Section 301 prohibits the transmission of radio signals without an FCC license. A Notice of Apparent Liability was issued for each of the 26 frequencies used by Madison, and each notice imposed a monetary forfeiture penalty of $1,000 per channel for each of the two days that the violations were detected. This resulted in a total forfeiture of $2,000 per channel. Since 26 Notices of Apparent Liability were issued, the total monetary forfeiture penalty imposed on Madison was $52,000. The FCC's authority to issue monetary forfeiture penalties for violations of the Communications Act is contained in Section 503(b) of the Communications Act. 47 U.S.C. Section 503(b).

3. Madison responded on February 5, 1991, and admitted that it had operated on the 26 frequencies without FCC licenses. Madison explained that it operated a small, rural cable system in Alabama, and had decided to extend its service to Huntsville, Alabama, by establishing a "wireless cable" system. Madison further explained that its testing of this "wireless cable" system resulted in the violations.[1] Madison at this time submitted a check for $52,000 to pay the forfeiture penalties "so as to remove the cloud over applications that are pending before the Commission," and stated that it intended "to file a petition seeking a reduction in the size of the forfeiture."

4. On March 5, 1991, Madison submitted a "Petition for Mitigation of Forfeiture." The Chief of the FCC's Field Operations Bureau responded on July 23, 1991, and affirmed the $52,000 in monetary forfeiture penalties. Madison then submitted a Petition for Reconsideration on August 27, 1991, and the Chief of the Field Operations Bureau again upheld the $52,000 penalty.

5. Madison in its application for review to the FCC states a number of reasons why the $52,000 in monetary forfeiture penalties should be reduced "to not more than $26,000." Madison argues that it was not represented by an attorney knowledgeable regarding communications law at the time of the violations, and, therefore, did not know that test transmissions without an FCC license violated the Communications Act. Also, Madison claims that its transmissions caused no harm, and Madison has no record of prior violations. Madison further states that it was incorrect for the FCC to impose a penalty based on each channel used by Madison, and instead its wireless cable operation should be considered "a single unitary system" subject to a single forfeiture penalty. Madison claims, moreover, that the FCC "has failed to treat Madison in a manner comparable to those who are similarly situated."

6. Madison's main argument appears to be that the forfeiture penalty has caused it financial problems. To support this, Madison submitted financial information. Madison also explains that to pay the $52,000 penalty, it had to borrow the money. Madison further states "Bluntly put, the magnitude of the forfeiture has had and continues to have a substantial adverse impact on Madison's ability "to offer a wireless cable service to the public and is contrary to the Commission's efforts to promote the emergence of wireless cable as an effective competitor to the Cable Television monopoly" and that the FCC's penalty "took away capital needed to hook up new customers."

III. DISCUSSION AND CONCLUSION

7. We have reviewed the entire record in this proceeding and are persuaded that the forfeiture penalty should be reduced but not eliminated. As noted previously, *see* note 1, *supra*, more than tests were involved here. Oversight or failure to become acquainted with the FCC's requirements--due to a lack of attorney or otherwise--does not excuse a violation. *Triad Broadcasting Company, Inc.*, 96 FCC 2d 1235, 1242 (1984). While Madison's unauthorized operation may have been in connection with "a single unitary system," nevertheless Madison was indisputably transmitting on 26 different frequencies without FCC authorization. A monetary forfeiture penalty was appropriately imposed on each of the 26 unlicensed operations. Further, Madison has not provided sufficient financial information to demonstrate that it is unable to pay a $52,000 forfeiture (indeed, it already paid it) or that it will have an adverse

[1] Madison's transmissions consisted of different video programming on each of the 26 channels and not a traditional type of test signal. Devices to receive these transmissions had been installed with a number of potential subscribers, perhaps at 75 or 80 locations. It appears that the installation of these devices was an ongoing process, and that no charges had been assessed for the installation or the receipt of the video programming.

impact on its ability to provide cable service to the public. The fact that no actual harm was demonstrated does not affect our determination that this was a serious violation justifying a significant forfeiture. In light of Madison's statement that it has a history of overall compliance with the Act and our rules, and the lack of any contradictory evidence in our files, however, the total penalty is reduced from $52,000 to $26,000.

IV. ORDERING CLAUSES

8. IT IS ORDERED that pursuant to Section 5(c)(5) of the Communications Act of 1934 and Section 1.115(g) of the FCC's rules, the Application for Review filed by Madison is GRANTED to the extent indicated herein. 47 U.S.C. Section 155 (c)(5), 47 C.F.R. Section 1.115(g).

9. IT IS FURTHER ORDERED that a copy of this Order shall be sent certified mail, return receipt requested, to Paul J. Sinderbrand, Esq.: Keck, Mahin & Cate, Attorneys at Law; 1201 New York Avenue N.W.; Penthouse; Washington, D.C. 20005-3919; and to Madison Communications, Inc.; P.O. Box 561; Athens, Alabama 35611.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of Port of Ilwaco
Ilwaco, Washington
for a forfeiture

ORDER

Adopted: January 6, 1993; Released: March 9, 1993

By the Commission:

I. INTRODUCTION

1. Before the Commission is a letter dated February 4, 1992, from Mr. Mik Hendrickson, Port manager, Port of Ilwaco, Ilwaco, Washington, to the Chief, Field Operations Bureau, Federal Communications Commission (FCC), stating that "At this time we would once again like to appeal" a $1,250 monetary forfeiture penalty that had been assessed by the FCC against the Port of Ilwaco. This letter is accepted as an Application for Review under Section 1.115 of the Commission's rules. 47 C.F.R. Section 1.115.

II. BACKGROUND

2. On June 10, 1991, the FCC's Ferndale, Washington Office was monitoring 156.425 MHz, and recorded a radio conversation between a base station and a mobile station that appeared to be operated by the Port of Ilwaco. On June 13, the FCC's Ferndale Office telephoned the manager of the Port of Ilwaco, and confirmed that the Port had been operating radio transmitters on 156.425 MHz. The FCC's records did not reflect that the Port had been issued an FCC license to operate radio transmitters.

3. The FCC's Ferndale Office issued the Port of Ilwaco on June 19, 1991, a notice of Apparent Liability for a monetary forfeiture penalty for willfully violating Section 301 of the Communications Act of 1934. 47 U.S.C. Section 301. Section 301 prohibits the transmission of radio signals without an FCC license. The Port of Ilwaco responded on July 18, 1991. The FCC's Ferndale Office issued a Notice of Forfeiture for a $1,250 monetary forfeiture penalty on July 24, 1991. The Port responded by letter on August 19, and the FCC's Ferndale Office replied on August 22. Since the Port of Ilwaco indicated in its correspondence that it wished to appeal the penalty, the Chief of the FCC's Field Operations Bureau treated this request as a Petition for Reconsideration under Section 1.106 of the FCC's rules, and affirmed the $1,250 monetary forfeiture penalty in a letter to the Port dated November 12, 1991. 47 C.F.R. Section 1.106.

4. The Port of Ilwaco in its letters admits the violation and has paid the $1,250 monetary forfeiture penalty, but states a number of reasons why the penalty should be rescinded. The manager of the Port explains that "coming into a new position [as Port Manager], concern over the radio license was not a high priority since the radio was being used in what I assumed to be a legal manner;" Port employees indicated that the radios were licensed; the violation was not willful; prompt corrective action was taken; others committing the same violation have had their penalties rescinded by the FCC; and the Port is a local government authority and, therefore, is exempted from FCC penalties.

III. DISCUSSION AND CONCLUSION

5. We have reviewed the entire record in this proceeding and we find no reason to disturb the results. The Port of Ilwaco was not licensed to transmit on 156.425 MHz. Bad advice from an employee does not excuse an organization's violation since organizations are responsible for the acts of their employees. Furthermore, oversight or failure to become acquainted with the FCC's requirements does not excuse a violation. *Triad Broadcasting Company, Inc.*, 96 FCC 2d 1235, 1242 (1984). Claims that an omission was only "a technical or a clerical error... implies the type of indifference to Commission Rules that justifies the imposition of forfeitures...." *Standard Communications Corporation*, 1 FCC Rcd. 358 (1986).

6. The violation, moreover, was willful. Section 312(f)(1) of the Communications Act of 1934 defines a willful violation as "the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act... ." 47 U.S.C. Section 312(f)(1). This definition applies to Section 503(b), *e.g., Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991). Willfulness exists if there is a voluntary act in that a person knew that he was doing the act in question such as using a radio transmitter. Furthermore, to establish a willful violation, it is not necessary to establish that a person knew he was acting wrongfully. *Id.* Prompt corrective action, moreover, does not nullify a forfeiture penalty. *Station KGVI, Inc.*, 42 FCC2d 258, 259 (1973).

7. In 1990, the FCC staff issued a public notice that stated "The routine amount for a first violation of unauthorized operation in the... marine... radio service [is]...$1,250." *Unlicensed Radio Operations (Routine Fines)*, 67 RR2d 619 (FOB 1990). The value of this monetary forfeiture penalty is authorized by Section 503(b)(2) of the Communications Act. 47 U.S.C. Section 503(b)(2).[1] The Port of Ilwaco has not presented compelling reasons or provided details to support its claim that the FCC's penalty assessed against the Port is dissimilar compared to penalties issued to other unlicensed radio operators detected by the FCC. Finally, a local government authority may be subject

[1] Under existing policy, the forfeiture would be higher. *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992) *petition for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992)

to an FCC monetary forfeiture penalty. *City of Camden,* 16 RR2d 711 (1969); *City of Jacksonville, Florida,* 46 RR2d 1336 (Broadcast Bureau) (1979).

IV. ORDERING CLAUSES

8. IT IS ORDERED that pursuant to Section 5(c)(5) of the Communications Act of 1934 and Section 1.115(g) of the FCC's rules, that the relief sought in the Application for Review filed by the Port of Ilwaco is DENIED. 47 U.S.C. Section 155(c)(5), 47 C.F.R. Section 1.115(g).

9. IT IS FURTHER ORDERED that a copy of this Order shall be sent certified mail, return receipt requested, to Port of Ilwaco, P.O. Box 307, Ilwaco, Washington 98624, Attention: Mr. Mik Hendrickson, Port Manager.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of The Computer Force,
Lakeland, Florida,
for a Forfeiture

ORDER

Adopted: January 6, 1993; Released: March 9, 1993

By the Commission:

I. INTRODUCTION

1. Before the Commission is a letter dated May 18, 1992, from Mr. Rod Proctor, Sales Manager, The Computer Force, Inc. (a retail computer store), Lakeland, Florida, "requesting an Application for Further Review" of a $2,000 monetary forfeiture penalty that had been imposed on The Computer Force by the Federal Communications Commission's (FCC) Tampa, Florida, Office. This letter is accepted as an Application for Review under Section 1.115 of the FCC's rules. 47 C.F.R. Section 1.115.

II. BACKGROUND

2. On August 23, 1990, an FCC inspector posing as a potential customer visited The Computer Force store in Lakeland, Florida, where personal computers were being marketed. The Computer Force had on display a DFI 386 computer which was located near the middle of other computers on display in the store. A salesman explained the features of the computer to the FCC inspector. The salesman also said that "the computer was built there" and could be customized to meet the needs of individual customers. There was no label on the computer indicating that it had been authorized by the FCC.

3. On October 4, 1990, the FCC's Tampa Office issued a Notice of Apparent Liability for a monetary forfeiture penalty to The Computer Force for willfully violating Section 2.803 of the FCC's rules by offering for sale the DFI 386 computer without FCC authorization. 47 C.F.R. Section 2.803. The Computer Force responded on October 10, 1990, denying the violation. On May 21, 1991, the FCC's Tampa Office issued The Computer Force a Notice of Forfeiture for a $2,000 monetary forfeiture penalty. On May 23, 1991, The Computer Force requested reconsideration of this penalty. The Chief of the FCC's Field Operations Bureau replied on April 13, 1992, affirming the $2,000 penalty.

4. Section 2.803 of the FCC's rules prohibits the marketing, including the displaying or offering for sale, of radio frequency devices that require, but have not received, FCC authorization. Personal computers must be authorized by the FCC. The type of authorization that is required is certification. 47 C.F.R. Sections 15.3(i) and (s), and 15.101. Sections 2.901 through 2.1065 of the FCC's rules explain the equipment authorization procedures. 47 C.F.R. Sections 2.901-2.1065. To be FCC authorized, personal computers must meet technical standards designed to promote the efficient use of the radio spectrum and to minimize the possibility that computers will cause interference to other electrical equipment. 47 C.F.R. Section 2.901 and 15.105(b). Furthermore, FCC authorized computers must have a label indicating that they have been authorized. 47 C.F.R. Section 2.925, 2.926 and 15.19. The FCC's authority to impose monetary forfeiture penalties for violations of its rules is contained in Section 503(b) of the Communications Act of 1934. 47 U.S.C. Section 503(b).

III. DISCUSSION AND CONCLUSION

5. We have reviewed the entire proceeding and we find no reason to disturb the results. There is no record at the FCC indicating that a personal computer was authorized by the FCC under the name The Computer Force or DFI in August 1990, and The Computer Force has not claimed that it was authorized. The displaying in a retail store and the offering to sell the unauthorized computer violated Section 2.803 of the FCC's rules.

6. The Computer Force's main argument appears to be that "the computer in question was not on display for sale but in fact, only a case housing a logic board and CPU on vendor loan for evaluation only" and "We... receive systems which are restricted by our vendors to demonstration only and aren't allowed for resale." If a vendor provided a retail store with computers that the vendor restricted "to demonstration only" or "evaluation" and "aren't allowed for resale," it would appear that these restrictions would usually be in writing. However, no evidence, such as a written instruction from a vendor, was presented that the DFI 386 computer was of this nature. A salesperson in the store, moreover, gave no indication that the computer was not for sale. Indeed, a salesperson tried to sell it to the FCC inspector, and said it was built at the store and could be customized to meet the needs of individual customers. The location of the DFI 386 computer in the store also indicates that it was for sale. The computer was located near the middle of a display of other computers that were for sale.

7. Even if a vendor had provided the DFI 386 computer for evaluation only and had prohibited its resale, and there had been no attempt by a salesperson to sell the computer, Section 2.803 of the FCC's rules would still be violated. Section 2.803 prohibits not only the offering to sell computers that have not been authorized by the FCC, but also the displaying of these computers. The DFI 386 computer was clearly on display in the retail store, and The Computer Force does not dispute this. The mere displaying of the computer in the store; independent of any ability, intent, or attempt to sell the computer; violated Section 2.803.

8. Although Section 2.803 provides an exemption from its prohibition against the displaying of unauthorized computers, this exemption is not relevant to this case. Section 2.803 allows computers that lack FCC authorization to be displayed if there is a conspicuous notice that the computers have not been authorized by the FCC and may not be offered for sale. The FCC inspector did not observe this notice at the computer, and The Computer Force does not claim that there was a conspicuous notice.

9. The Computer Force was correctly charged with a willful violation of the FCC's rules. Section 312(f)(1) of the Communications Act of 1934 defines a willful violation as

"the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act... ." 47 U.S.C. Section 312(f)(1). This definition applies to Section 503(b) as well, *e.g., Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991). Willfulness exists if there is a voluntary act in that a person knew that he was doing the act in question such as displaying or attempting to sell a computer. Furthermore, to establish a willful violation, it is not necessary to establish that a person knew he was violating an FCC rule, only that he knew that he was doing the act in question. *Id.* The claim that the violation may have occurred because "Our service people are not always knowledgeable about which computers are for resale, evaluation, or for demonstration only" does not excuse the violation. Employers are responsible for the acts of their employees. *Triad Broadcasting Company, Inc.*, 96 FCC2d 1235, 1242 (1984).

IV. ORDERING CLAUSES

10. IT IS ORDERED that pursuant to Section 5(c)(5) of the Communications Act of 1934 and Section 1.115(g) of the Commission's rules, the relief sought in the Application for Review filed by The Computer Force is DENIED. 47 U.S.C. Section 155(c)(5), 47 C.F.R. Section 1.115(g).

11. IT IS FURTHER ORDERED that The Computer Force forfeit to the United States $2,000 for its violation of Section 2.803 of the FCC's rules. Payment should be submitted within 30 days of the receipt of this letter, and may be by check or money order payable to the Federal Communications Commission. The number 3153222-91002 should be placed on the check and it should be sent to:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

Monetary forfeiture penalties not paid within 30 days may be referred to the U.S. Attorney for collection through a civil suit. 47 U.S.C. Section 504(a).

12. IT IS FURTHER ORDERED that a copy of this Order shall be sent certified mail, return receipt requested, to The Computer Force, 1001 S. Florida Ave., Lakeland, Florida 33803, Attention: Mr. Rod Proctor, Sales Manager.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ATLANTIC PAYPHONE COMPANY
Complainant,

v.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, AND — File No. E-92-42
AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. E-92-43
Defendants.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and Investigations Branch
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: March 9, 1993; Released: March 15, 1993

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On January 28, 1992, Atlantic Payphone Company (Atlantic) filed the above-captioned complaints against New England Telephone and Telegraph Company and American Telephone and Telegraph Company alleging that the Defendants had violated the Communications Act in connection with certain disputed long distance calls that were fraudulently made from Atlantic's payphones. The defendants have denied the allegations and moved to dismiss the complaints.

2. After completing discovery and submitting briefs and reply briefs in the matter, the parties negotiated a settlement agreement resolving all issues in the complaints. On November 20, 1992, the complainant filed a Motion to Dismiss its claims with prejudice.

3. On the basis of the statements contained in the Motion, we grant the Complainant's dismissal request.

4. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 208, and authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Motion to Dismiss the above-captioned complaints IS GRANTED.

5. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and this proceeding IS TERMINATED.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNIGROUP, INC.
Complainant,

v. File No. E-92-104

SOUTHWESTERN BELL
TELEPHONE COMPANY,
Defendant

ORDER

Adopted: March 9, 1993; Released: March 15, 1993

By the Chief, Formal Complainants and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On August 19, 1992, CommuniGroup, Inc. (CGI) filed the above-captioned formal complaint against Southwestern Bell Telephone Company (SWBT) seeking damages resulting from SWBT's alleged violations of the Commission's rate of return prescription for the period October 1, 1985 through December 31, 1986. On March 3, 1993, however, CGI filed a motion for dismissal stating that CGI and SWBT have reached a mutually agreeable settlement of all pending controversies.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that CGI's Motion to Dismiss with Prejudice IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints
and Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE
AND TELEGRAPH COMPANY,
Complainant,

v.

CINCINNATI BELL TELEPHONE COMPANY, and — File No. E-90-042
WALNUT HILL TELEPHONE COMPANY, — File No. E-90-060
Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: February 22, 1993; Released: March 16, 1993

By the Commission:

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I. INTRODUCTION

1. In this Memorandum Opinion and Order, we award damages to complainant, American Telephone and Telegraph Company (AT&T), for defendants[1] violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988 for the reasons and to the extent indicated below. As also discussed below, we grant AT&T's request for interest on the damages awarded here.

II. BACKGROUND

2. The case presented by the complainant is virtually identical to the case by the complainant in *AT&T Communications v. Northwestern Bell Telephone Co., et al.*[2] In that proceeding, we held that local exchange carrier (LEC) rates that produced earnings in excess of a Commission prescription were unjust and unreasonable within the meaning of Section 201(b) of the Communications Act.[3] We also held that a complainant is entitled to recover damages to the extent that it can show that it suffered actual damage as a consequence of such violations. Subsequently, in the damages phase of the proceeding, we held that AT&T had properly shown that it had been harmed by paying the defendants' rates that produced the excessive overall earnings and awarded AT&T monetary damages, plus interest computed at the IRS rate.[4]

3. A detailed accounting of the Commission's rate of return regulatory scheme as well as relevant Commission and court decisions is set forth in the *AT&T Liability Order* [5] and the *AT&T Damages Order* [6] and will not be repeated at length here. However, a brief discussion of the development and implementation of the Commission's rate of return prescription is helpful to our analysis of the instant complaints.

4. Following the divestiture of the former Bell system and the concurrent development of the access charge system,[7] the Commission prescribed a rate of return system

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[1] Defendants are Cincinnati Bell Telephone Company (CBT) and Walnut Hill Telephone Company (Walnut Hill).

[2] American Telephone and Telegraph Co. v. Northwestern Bell Telephone Co., 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam). *See also* MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co., *et al.*, 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990) (*MCI Reconsideration Order*) (jointly "*MCI Orders*"), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam).

[3] *AT&T Liability Order* at 143. Section 201(b), 47 U.S.C. § 201(b), provides that "[a]ll charges, practices, classifications, and regulations for and in connection with . . . communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful."

[4] AT&T Communications v. Northwestern Bell Telephone Company, FCC 93-69 (released February 8, 1993) (*AT&T Damages Order*).

[5] 5 FCC Rcd at 143-44.

[6] *AT&T Damages Order* at paras. 2-3, 9-10.

[7] The Commission has prescribed for all local exchange carriers, including the defendants, a methodology known as the "access charge system," which carriers are required to follow in tariffing their interstate services. The system determines, *inter alia*, the carriers' overall rate structure and the allocation of costs within that structure, and was in effect during the period covered by the complaints. The access charge system is codified in Part 69 of the Commission's rules. *See* 47 C.F.R. § 69.1 *et seq.*

for all eight entities that emerged after divestiture (i.e., AT&T and the seven Regional Bell Holding Companies) and approximately 1400 other local exchange carriers as well. In a broad rulemaking proceeding, the Commission adopted: (1) methodologies to be used to prescribe maximum rates of return; (2) procedures for represcribing rates of return on a regular basis; (3) a system of monitoring carriers' earnings; and (4) a requirement that overearnings be refunded, either directly to those who had paid rates that produced the overearnings, or pursuant to automatic, prospective adjustments to tariff rates.[8] For the two-year time period at issue in the instant complaints, January 1, 1987 through December 31, 1988, local exchange carriers, including the defendants, were required to file rates calculated to earn a 12 percent rate of return for overall interstate access.[9] In accordance with the Commission's allowance of a "buffer," carriers were given notice that 12.25 percent would be the maximum allowable rate of return on overall interstate earnings and that 12.40 percent would be the maximum allowable rate of return for any access service category.[10] The buffer[11] would be used to determine whether the prescription had been violated.[12]

5. In January 1988, the U.S. Court of Appeals for the District of Columbia Circuit set aside the automatic refund mechanism as arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce."[13] The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate of return prescription."[14]

6. In February 1988, AT&T filed formal complaints against a number of LECs alleging violations of the Commission's rate of return prescription for the October 1, 1985 through December 31, 1986 monitoring period and requesting monetary damages. During the same time period, numerous similar complaints were filed by other interstate access customers alleging rate of return prescription violations for the initial 15-month monitoring period.[15] In January 1990, the Commission released its *AT&T Liability Order* granting AT&T's complaint and directing AT&T to file a supplemental complaint for damages. On November 22, 1989, AT&T filed additional complaints alleging, *inter alia,* violations of the Commission's prescription for the January 1, 1987 through December 31, 1988 monitoring period by the defendants.[16] In October 1991, the Commission placed all pending rate of return complaints, including AT&T's supplemental complaint for damages, in abeyance pending resolution of a related court remand in *Illinois Bell Tel. Co. v. FCC* .[17] On July 15, 1992, the Bureau released an order establishing further discovery and briefing schedules for these proceedings.[18] Pursuant to the *Discovery Order,* the parties submitted briefs and reply briefs setting forth their respective claims and arguments.[19]

These rules were developed in a proceeding that was the subject of numerous challenges on appeal. With a few exceptions not relevant to the instant complaint proceedings, these appeals were denied by the D.C. Circuit. *See NARUC v. FCC,* 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied,* 469 U.S. 1227 (1985).

[8] *See* Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Carriers, CC Docket No. 84-800, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), (Phase I Order), *on reconsideration,* Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986) (Phase I Reconsideration); *on further reconsideration,* 2 FCC Rcd 190 (1987). *See also* Procedures and Methodologies to Establish Reporting Requirements, CC Docket No. 86-127, FCC 86-514 (released Dec. 3, 1986), 52 Fed. Reg. 273 (Jan. 5, 1987).

[9] *See* Authorized Rate of Return for the Interstate Access Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase III, FCC 86-354, 51 Fed. Reg. 32,920 (Sept. 17, 1986) (*Phase III Order), recon. denied,* 2 FCC Rcd 5636 (1987). *See also,* Procedures and Methodologies to Establish Reporting Requirements, CC Docket No. 86-127, FCC 86-514 (released Dec. 3, 1986), 52 Fed. Reg. 273 (Jan.5 , 1987).

[10] 47 C.F.R. § 65.700.

[11] *See AT&T Liability Order,* 5 FCC Rcd at 143-44:

> . . . the Commission established both an authorized rate of return and a 'spread' or 'buffer' above that return for use in proceedings relating to the enforcement of the prescription. In other words, the authorized return would be employed in computing tariff rates; the spread, or buffer, would be used in combination with the authorized return 'to determine whether a rate of return prescription had been violated.' [footnote omitted.]

[12] *See Phase I Order,* 50 Fed. Reg. at 41,352 (para. 21).

[13] *American Tel. & Tel. Co. v. FCC,* 836 F.2d 1386, 1390 (D.C. Cir. 1988) (*AT&T v. FCC).* For a detailed discussion of *AT&T v. FCC, see AT&T Liability Order,* 5 FCC Rcd at 146-48.

[14] *AT&T v. FCC,* 836 F.2d at 1392.

[15] These additional complaints are being dealt with in separate Section 208 complaint proceedings.

[16] The defendants all filed answers and motions to dismiss. In addition, on October 19, 1990, CBT filed a motion requesting that the record be updated with a supplement to its motion to dismiss. AT&T replied to CBT's request on November 1, 1990. We will grant CBT's motion and accept CBT's supplement for filing.

[17] 911 F.2d 776 (D.C. Cir. 1990). *See* American Telephone and Telegraph Company v. Cincinnati Bell Telephone Co., *et al.,* 6 FCC Rcd 651 (Com. Car. Bur. 1991). The Commission acted on the remand in October 1991. *See* Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, CC Docket No. 86-497, 7 FCC Rcd 296 (1991), *appeal docketed sub nom. Illinois Bell Telephone Co., et al. v. FCC,* No. 90-1020 (D.C. Cir. Jan.11, 1991). On February 6, 1992, the Common Carrier Bureau (Bureau) released an order reactivating the instant cases. *See* American Tel. & Tel. Co. v. Cincinnati Bell Tel. Co., 7 FCC Rcd 439 (Com. Car. Bur. 1992).

[18] American Tel. & Tel. Co. v. Cincinnati Bell Tel. Co., *et al.,* 7 FCC Rcd 4498 (Com. Car. Bur. 1992) (*Discovery Order).* CBT and Walnut Hill served interrogatories on AT&T on July 27, 1992, to which AT&T responded on August 14, 1992. In addition, CBT filed a Motion to Compel, which AT&T opposed. While there is disagreement over whether AT&T has proven damages, AT&T and CBT do not dispute the underlying amounts (the amounts billed to AT&T and the amounts reported on CBT's Form 492) upon which computations would be based. Also, the parties have stipulated to the amount of AT&T's share of CBT's overearnings for the 1987-1988 monitoring period. Accordingly, we dismiss CBT's Motion to Compel.

[19] On September 3, 1992, AT&T filed its briefs in the CBT proceeding (AT&T Br.1) and in the Walnut Hill proceeding (AT&T Br.2). CBT and Walnut Hill also filed their briefs on September 3, 1992 (CBT Br.; Walnut Hill Br.). AT&T filed its reply brief in the CBT proceeding on September 18, 1992 (AT&T RBr.1) and in the Walnut Hill proceeding on September 14, 1992 (AT&T RBr.2). CBT filed its reply brief on September 17, 1992 (CBT RBr.), and Walnut Hill filed its reply brief on September 14, 1992 (Walnut Hill RBr.). CBT filed a

III. DISCUSSION

7. AT&T's damages claim rests primarily on the contention that the proper measure of damages it incurred as a result of defendants' rate of return prescription violations is the difference between the amounts it actually paid defendants for overall interstate access services during the January 1, 1987 through December 31, 1988 monitoring period and the amount it would have paid if defendants' rates produced earnings that did not exceed the Commission's prescription. Defendants, however, have raised a number of challenges to AT&T's damages claims, including a number of arguments that were previously considered and rejected by the Commission in the *AT&T Liability Order*. We address the parties' pertinent contentions below.

A. Preliminary Matters

1. Contentions of the Parties

8. As a preliminary matter, CBT contends that its procedural rights have been unduly restricted in this proceeding.[20] First, CBT claims that AT&T failed to satisfy Section 1.722 of the Commission's rules by failing to identify within the allowable time period, with reasonable certainty, the amount of damages for which recovery is sought.[21] Second, CBT argues that the Commission's *Discovery Order* "sets a schedule for discovery not in accordance with any of its Rules, and is unreasonable."[22] CBT claims that the Bureau *sua sponte* ruled certain discovery relevant without affording CBT the opportunity to object, effectively ignoring its right to do so pursuant to Section 1.729 of the Commission's rules.[23] Further, CBT alleges that the time given by the Bureau to complete discovery was unreasonable because it did not afford CBT the opportunity to compel responses to interrogatories by AT&T that were relevant.[24] Finally, CBT states that the Bureau has not acknowledged that it is waiving its own rules, even though the Commission has the discretion to do so upon a showing of good cause.[25]

9. AT&T responds that CBT's argument that its procedural rights have been unduly restricted is absurd.[26] AT&T argues that it did specify with reasonable certainty the amount of damages it claimed by stating its measure of damages in its complaint.[27] In addition, AT&T argues that CBT has not shown that it has been harmed by AT&T's inability to state a damages amount in its complaint.[28] Finally, AT&T contends that CBT's argument that the *Discovery Order* has abridged its rights ignores the fact that the Bureau gave CBT discovery rights in addition to those in the Commission's rules by allowing another round of interrogatories and briefs.[29]

2. Discussion

10. CBT's claims that its procedural rights have been unduly restricted in the instant proceeding are unavailing. Its argument that AT&T failed to plead damages with specificity in a timely manner as required by Section 1.722 of the rules is incorrect. In establishing discovery and briefing schedules in this proceeding, we afforded both complainant and defendant ample opportunity to develop evidence and arguments on the issue of damages and liability.[30] We are satisfied that AT&T has presented its damage claims consistent with the *Discovery Order* and Section 1.722 of the rules. Moreover, under Section 208 of the Act, the Commission has considerable discretion to "investigate matters complained of in such a matter and by such means as it shall deem proper."[31] We are satisfied that CBT was afforded ample opportunity to develop relevant evidence and arguments to support its claims. In the absence of any showing that the Bureau committed prejudicial error or unduly restricted CBT's development of its case, we find no merit in these claims.

B. Liability For Damages

1. Contentions of the Parties

11. AT&T alleges that the rates it paid for certain of the defendants' interstate access services during the period from January 1, 1987 through December 31, 1988 were unjust and unreasonable in violation of Section 201(b) of the Act. AT&T supports its allegations with evidence taken from reports filed with the Commission by the defendants for the two-year period at issue that show that defendants achieved earnings in excess of the Commission's prescribed rate of return for overall interstate access.[32]

12. AT&T requests that the Commission declare that the defendants' charges for the period from January 1, 1987 through December 31, 1988 are in violation of the rate of return prescription and Section 201(b) of the Act, and order the defendants to pay damages to AT&T equal to the difference between the amount actually paid by AT&T for interstate access service during the period and the amount that AT&T would have paid if the defendants' charges earned no more than the maximum allowable rate of return, plus interest at the rate specified in CC Docket No. 84-800.

13. The defendants raise a number of issues that have been fully considered by the Commission in the *AT&T Liability Order* and the *AT&T Damages Order* (jointly *"AT&T Orders"*). They will be briefly discussed below.

14. Defendants advance a variety of arguments that AT&T has failed to state a cause of action under the Act.[33] Primarily, defendants argue that AT&T's claims are barred

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Supplement to the Record (Supplement) on October 23, 1992, which is unopposed. We will accept CBT's Supplement for filing.

[20] CBT Br. at 35.

[21] *Id.* at 35-36.

[22] *Id.* at 36.

[23] *Id.* citing to 47 C.F.R. § 1.729.

[24] *Id.* at 36-37.

[25] *Id.* at 37, citing to *Wait Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

[26] AT&T RBr.1 at 7.

[27] AT&T RBr.1 at 7-8.

[28] *Id.* at 8.

[29] *Id.* at 9.

[30] *Discovery Order*, 7 FCC Rcd 4498.

[31] 47 U.S.C. § 208(a).

[32] AT&T states that defendants' monitoring reports for the 1987-1988 monitoring period recite that CBT earned a rate of return of 14.06% on interstate access services and that Walnut Hill earned a rate of return of 13.09% on interstate access services.

[33] The issues and arguments raised by Walnut Hill and CBT in

by *AT&T v. FCC*.[34] These arguments take on several forms. CBT contends that not only is the automatic refund mechanism unlawful, but the end result of the mechanism is also unlawful.[35] Defendants also argue that by awarding amounts for overearnings the Commission would be effectively reinstating the invalid automatic refund scheme.[36]

15. Defendants also argue that the decision in *Ohio Bell*, issued after the release of the *AT&T Liability Order*, requires dismissal of AT&T's complaints.[37] According to the defendants, *Ohio Bell* reaffirms the proposition established in *AT&T v. FCC* that the Commission cannot award damages for carrier overearnings without allowing the carrier to recoup or offset underearnings.[38]

16. In addition, CBT contends that because AT&T does not and cannot show that CBT acted or failed to act in a manner that is inconsistent with the Communications Act or the Commission's rules, a finding of liability would only be based on the imposition of a strict liability standard.[39] CBT argues that AT&T's claim that CBT is liable for damages is untenable because CBT has fully complied with the Act and the Commission's rules. CBT also argues that the rates charged were not carrier-initiated, and therefore, there has been no violation of the Act or the rules.[40] Both CBT and Walnut Hill argue that AT&T may not receive a refund through this complaint proceeding without violating the rule against retroactive ratemaking.[41]

2. Discussion

17. We have carefully examined the record before us and conclude that the defendants have cited no facts and have made no arguments here that would warrant a ruling contrary to the *AT&T Orders*.

18. *Failure to State a Cause of Action:* In both the *AT&T Liability Order* and the *MCI Liability Order*, we rejected identical claims and held that *AT&T v. FCC* establishes no precedent that bars an individual complainant from seeking a remedy under Section 208 of the Act for damages based on a carrier's reported overearnings.[42] We stated that

> we are not persuaded by defendants' claims that earning in excess of prescribed rate of return does not violate that Act or, if it does, that the Commission *is required* to take a carrier's underearnings as well as its overearnings into account in determining whether a violation has occurred.
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> * * *
>
> We find that a valid prescription bound the defendants to a maximum earnings limitation, and the defendants admit that they earned in excess of the amount during the period in question.[43]

We found further that *AT&T v. FCC* did not pertain to Section 208 complaint proceedings. The Commission has the authority to order a carrier to pay damages if a complainant meets the burden of establishing both a violation of the Act and the actual injury.[44]

19. *Retroactive Ratemaking.* We also held in the *AT&T Liability Order* that enforcement of a rate of return prescription is not retroactive ratemaking because the obligation being enforced was set prospectively when the prescription was adopted.[45] Defendants have not persuaded us to alter our decision. We have also rejected the contention that rates charged in conformity-with a lawfully filed tariff cannot be unjust and unreasonable.[46] As we stated in the *AT&T Liability Order*, "legally effective, carrier-initiated tariffs can always be challenged as unreasonable and unlawful."[47] The issue raised by these complaints is not the

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response to AT&T's claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them separately.

[34] 836 F.2d 1386. The court invalidated the Commission's procedure to enforce its rate of return prescriptions through automatic refunds of carrier overearnings to customers. For a detailed discussion of *AT&T v. FCC, see AT&T Liability Order*, 5 FCC Rcd at 146-48. The U.S. Court of Appeals for the Sixth Circuit, relying on *AT&T v. FCC*, vacated a Commission order that authorized refunds of earnings in excess of the authorized rate of return for the special access category over a period of years in the context of a strategic pricing investigation. *See Ohio Bell Tel. Co. v. FCC*, 949 F.2d 864 (6th Cir. 1991) (*Ohio Bell*). The court primarily relied upon the statement from *AT&T v. FCC* that a rate of return prescription is both a minimum and a maximum prescription. *See AT&T v. FCC*, 836 F.2d at 1390. The Commission has clarified, however, that it does not view a rate of return prescription as both a maximum and a minimum and has stated that

> [o]ur accumulated experience with rate of return prescriptions, and our review of the cost of capital evidence in this proceeding, convince us that there is no such point. * * * We believe there is a substantial gap between an earnings level that is fully adequate to assure attraction of capital on favorable terms, and an earnings level which, if sustained over time, would be confiscatory.

Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507, 7532 (1990), *appeal docketed sub nom. Illinois Bell Tel. Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan. 11, 1991).

[35] *See* CBT Br. at 10-12.

[36] *See, e.g.*, Walnut Hill Br. at 3-5.

[37] *See* CBT Br. at 11-13; Letter dated February 26, 1992 from Francis E. Fletcher, Jr. to Thomas D. Wyatt.

[38] *See, e.g.*, CBT Br. at 11-12.

[39] CBT Br. at 21-23.

[40] CBT Br. at 14. CBT contends that because its rates were computed pursuant to the Commission's formulas, and further, because the rates were subject to Commission review, its rates were effectively prescribed by the Commission. *Id.*

[41] *See, e.g.*, Walnut Hill Br. at 6, citing *Southern Union Gas Co. v. FERC.*, 725 F.2d 99 (10th Cir. 1984); *Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975); *Electrical Dist. No. 1 v. FERC*, 774 F.2d 490 (D.C. Cir. 1985); *Maislin Industries, U.S. v. Primary Steel, Inc.*, 110 S. Ct. 2759 (1990).

[42] *AT&T Liability Order*, 5 FCC Rcd at 147.

[43] *MCI Liability Order*, 5 FCC Rcd at 223 (emphasis in original).

[44] *AT&T Liability Order*, 5 FCC Rcd at 147, para. 43.

[45] *Id.* at 147, para. 41.

[46] *Id.* at 146-47, para. 36.

[47] *Id.* at 147, para. 36, quoting *Arizona Grocery v. Atchison, T.& S.F.R. Co.*, 284 U.S. 370, 384 (1932).

lawfulness of high profits in the abstract, but the lawfulness of profits in excess of a prescription. Accordingly we hold that, taking into account the buffer, profits in excess of a prescription are unjust and unreasonable.

20. *Ohio Bell:* We disagree with the defendants' claim that *Ohio Bell* and *AT&T v. FCC* compel us to dismiss AT&T's complaints. As we emphasized in the *AT&T Liability Order* and reaffirmed in the *AT&T Damages Order*, automatic refunds and refunds ordered under Section 204 of the Act are different from individual actions for damages under Section 208. Unlike the automatic refund mechanism in *AT&T v. FCC* or the refund procedure in *Ohio Bell*, both of which resulted from rulemaking proceedings initiated at the Commission's discretion, individual actions for damages under Section 208 are initiated by private parties seeking damages for injuries to themselves; those private parties have the burden of establishing both a violation of the Act and actual injury.[48] The courts in *AT&T v. FCC* and *Ohio Bell* did not discuss private complaints for damages; they did not invalidate private actions for damages; and this analysis is not applicable to the different, separately authorized complaint procedure set forth in Sections 206-209. Accordingly, those decisions do not require us to depart from our holding in the *AT&T Liability Order* that defendants have violated the Communications Act by earning in excess of a valid rate of return prescription, thereby making their rates unjust and unreasonable under Section 201 of the Communications Act and themselves liable for damages to the extent a complainant can establish that it was damaged as a result of the violation.[49]

21. *Defendants' Other Arguments:* We also disagree with CBT's assertion that the Commission would be imposing a strict liability standard should we find liability and award damages. We conclude that it is clear that there has been a violation of the Communications Act and that AT&T has satisfied its burden of proving that such a violation has occurred. Thus, there has not and will not be a strict liability standard imposed on any party. Furthermore, we have previously rejected defendants' claim that access rates were not carrier-initiated and we have not been persuaded to alter that decision.[50]

C. Damages and Interest Claims

22. AT&T's damages claims rest primarily on the contention that the proper measure of damages it incurred as a result of the defendants' rate of return prescription violations is the difference between the amounts it actually paid the defendants for interstate access services during the January 1, 1987 through December 31, 1988 monitoring period and the amount it would have paid if the defendants' rates produced earnings that did not exceed the Commission's prescription. The defendants, however, have raised a number of challenges to AT&T's damages claims, including a number of arguments that were previously considered and rejected by the Commission in the *AT&T Liability Order* and the *AT&T Damages Order*. We address the parties' pertinent contentions below.

1. Damages

a. Contentions of the Parties

23. As referenced above, AT&T's damages claims rest primarily on the contention that the proper measure of the damages it incurred as a result of defendants' violations is the difference between the amount it actually paid defendants for interstate access services during the January 1, 1987 through December 31, 1988 period and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[51] In the *Discovery Order*, the Bureau stated that it tended to agree, in principle, that a possible measure of the damages stemming from defendants' rate of return violations could be that difference.[52] The Bureau was not persuaded on the record before it, however, that a damages determination based solely on such a measure necessarily reflected actual damages incurred by AT&T.[53] The defendants were invited to submit evidence that could serve to mitigate or otherwise reduce AT&T's damages claims. Specifically, the Bureau stated that evidence that would show that AT&T's share of excessive earnings realized by defendants could be offset or otherwise reduced due to facts and circumstances surrounding AT&T's purchase of defendants' interstate access services for the 1987-1988 monitoring period might be relevant.[54]

24. AT&T and CBT stipulated as to the amount of AT&T's share of the revenue reduction that would result if CBT had earned a 12.25% rate of return during the 1987-1988 monitoring period.[55] AT&T claims that the resultant amount, $4,931,000, is the amount of damages, exclusive of interest, CBT owes to AT&T. In reaching the stipulation, however, CBT reserved the right to challenge this amount as an improper measure of AT&T's damages. In the case of Walnut Hill, AT&T states that it should be awarded damages of $128,000, exclusive of interest. In deriving the amount attributed to Walnut Hill, AT&T first calculated an estimate of what the defendants' net earnings would have been had they earned the maximum overall target rate of return plus buffer of 12.25%. AT&T then subtracted this amount from the defendants' actual net earnings as reported in the defendants' monitoring reports to determine the defendants' after-tax overearnings. The difference was then "grossed-up" to reflect tax adjustments.[56] AT&T also claims interest calculated at the maximum allowable rate of return for the monitoring period.[57] AT&T contends it is entitled to interest on the damage amounts which through August 31, 1992, totals $2,132,657.50 in the case of CBT and $55,360 in the case of Walnut Hill.

25. The defendants challenge AT&T's damages claims on a number of grounds, raising several arguments that were previously considered and rejected by the Commission in the *AT&T Liability Order* and the *AT&T Damages Order*. Defendants contend that by simply basing its damages claims on a calculation of AT&T's prorated share of overearnings, AT&T asks the Commission to award it damages

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48 *See AT&T Liability Order*, 5 FCC Rcd at 147, para. 43.
49 *Id.* at 149, para. 60.
50 *See id.* at 146-147.
51 AT&T Br.2 at 2-3.
52 *Discovery Order*, 7 FCC Rcd at 4499, para. 7.
53 *Id.*
54 *Id.*
55 AT&T Br.1 at Appendix A.
56 AT&T Br.2 at Attachment A.
57 AT&T Br.2 at 6-8.

in the same amounts it would have received under the automatic refund rule invalidated by the court in *AT&T v. FCC*.[58] The defendants maintain that such a result is expressly precluded by *AT&T v. FCC*. Defendants also contend that the decisions in *AT&T v. FCC* and *Illinois Bell Tel. Co. v. FCC*;[59] preclude an award of damages for past overearnings because those decisions limit the Commission to ordering prospective relief under Section 205 of the Act.[60]

26. Defendants next contend that, even if *AT&T v. FCC* and *Ohio Bell* do not preclude AT&T's damages claims, the claims still fail because AT&T's complaints do not establish a valid cause of action. According to defendants, to pursue a damages claim, AT&T must first show that the defendants charged unjust and unreasonable rates for interstate access services during the period in question, not that defendants' rates produced excessive returns for overall interstate access.[61] Walnut Hill further contends that AT&T must also prove what a just and reasonable rate would have been.[62] Moreover, defendants argue, Section 206 of the Act[63] requires AT&T to prove injury, causation, and the amount of damages in addition to establishing a violation of the Act.[64] Defendants maintain that by simply referencing defendants' earned rates of return for overall interstate access, AT&T has not only failed to allege any facts that would establish that defendants' rates were unjust and unreasonable during the period in question but has also failed to show that it sustained actual damage as a result of those rates.[65]

27. The defendants each raise arguments to support their claims that an award of damages to AT&T based on carrier overearnings is inappropriate for equitable and policy reasons. Both CBT and Walnut Hill claim that the amounts sought by AT&T are in effect, refunds of tariffed charges, not damages, and that such refunds are prohibited by *AT&T v. FCC*.[66]

28. In addition, CBT contends that AT&T has no valid claim for damages because AT&T has suffered no injury as a result of passing on the costs of interstate access to its customers.[67] CBT claims that AT&T has benefitted from CCBT's underearnings to a much larger degree than it has suffered from overearnings.[68] CBT argues that based on grounds of equity, any determination of damages must include consideration of other monitoring periods and allow underearnings to offset overearnings.[69]

29. Walnut Hill also contends that AT&T has suffered no injury because AT&T's interstate access costs were passed on to its customers.[70] In addition, Walnut Hill vigorously argues that regardless of how AT&T characterizes the relief it seeks, any form of refund or restitution to AT&T would be contrary to the public interest.[71] Walnut Hill further contends that an award of damages would be inequitable

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[58] *See, e.g.*, CBT Br. at 19-20, 25; Walnut Hill Br. at 3.

[59] 966 F.2d 1478 (D.C. Cir. 1992) (*Illinois Bell*).

[60] *See, e.g.*, CBT Br. at 18; Walnut Hill Br. at 6.

[61] CBT Br. at 14-17; CBT RBr. at 2.

[62] Walnut Hill Br. at 8.

[63] 47 U.S.C. § 206.

[64] *See, e.g.*, CBT Br. at 23-26; Walnut Hill Br. at 6-12.

[65] *See, e.g.*, CBT Br. at 23-26; Walnut Hill Br. at 6-12. CBT argues that AT&T has not attempted to establish a link between CBT's earnings and any damages that AT&T allegedly sustained, even though the burden of demonstrating a damages nexus is on AT&T. CBT Br. at 23. Furthermore, CBT contends that even if such a nexus could be established, according to *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1235 n.34 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981) (*ARINC*) and *Southern Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 455 (1979), *reh'g denied*, 444 U.S. 890 (1979) (*Seaboard*), the difference in rates or resultant earnings is not the measure of damages in a complaint case. CBT Br. at 24. CBT's reliance on these two cases is misplaced. In *Seaboard*, the Court addressed the narrow question of whether there must be judicial review of the Interstate Commerce Commission's (ICC) decision not to conduct a Section 15(8)(a) investigation of a tariff. The Court held that judicial review was inappropriate because the shippers could pursue individual complaints under Section 13(1) of the Interstate Commerce Act and the decision not to investigate under Section 15(8)(a) did not prejudge the lawfulness of the tariff. As the Court noted, the ICC's decision not to investigate had only two consequences -- the burden to establish reasonableness is shifted from the carrier to the shipper and the shipper might not be entitled to the full amount of the overcharge because it must prove actual damages. *Seaboard*, however, does not stand for the proposition that refunds for overcharges and an award of damages are always necessarily two different amounts. In fact, the Court acknowledged that these amounts may be identical. *See* 442 U.S. 444, 455, n.8.

The U.S. Court of Appeals decision in *ARINC* similarly dealt with the reviewability of a Commission decision to accept a tariff. The court held that such action by the Commission is unreviewable since parties claiming to be aggrieved by the Commission's acceptance of a tariff may avail themselves of the statutory complaint procedure in Section 208 of the Act. The court echoed the Supreme Court's ruling in *Seaboard* that the burden is on the complainant in an individual complaint action, and the amount of damages may not necessarily be the same as the amount received had the Commission investigated the tariff, found the rates to be unreasonable, and ordered refunds.

[66] CBT Br. at 19-20, 25; Walnut Hill Br. at 3.

[67] CBT Br. at 27-28; CBT RBr. at 5-6. CBT notes that the Commission has held that interexchange carriers necessarily pass through access charges to their customers. CBT Br. at 27, citing Teleconnect Co. v. Bell Tel. Co. of Pennsylvania, 6 FCC Rcd 5202 (1991); Long Distance USA, Inc. v. Bell Tel. Co. of Pennsylvania, 7 FCC Rcd 408 (1992). CBT argues that AT&T has not been damaged in any amount it paid to CBT because it recouped such amounts directly from its customers. CBT Br. at 27-28, citing *Obron v. Union Camp Corp.*, 477 F.2d 542 (6th Cir. 1973); *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971), *cert. denied*, 404 U.S. 871 (1971). CBT cites the above cases for the proposition that "[a] reseller who directly passes on any increased costs to his own customer is not injured." CBT Br. at 28, n.55.

[68] CBT Br. at 28-33; CBT RBr. at 7-8. CBT claims that it has underearned in every monitoring period since October 1985, with the exception of the 1987-1988 monitoring period. *Id.* at 25. Therefore, CBT argues, if their earnings for all periods since October 1985 are taken into account, AT&T has been "undercharged" a net amount of $3,103,839. CBT provides an exhaustive description of how this undercharge was computed. *See* CBT Br. at 28-33.

[69] *See, e.g.*, CBT RBr. at 7-8.

[70] Walnut Hill Br. at 7. Walnut Hill further argues that AT&T cannot prove consequential damages because AT&T refused to answer Walnut Hill's interrogatories regarding AT&T's plans to flow through any damages award to its customers. Walnut Hill Br. at 10-11.

[71] Walnut Hill Br. at 3-5, 13-18. Walnut Hill argues that AT&T must plead its case in equity and the Commission may only award a refund/damages if we find that the public interest will be served by a refund/damages award to AT&T. Walnut Hill contends that the leading case in this area is *Moss v. Civil*

because (i) there was uncertainty surrounding the tariff filings during the relevant period; and (ii) AT&T would receive a windfall that would be inconsistent with sound equitable principles.[72]

30. AT&T counters that defendants' threshold arguments regarding the effect of the court's ruling in *AT&T v. FCC* and *Ohio Bell* are inapposite and have largely been rejected or precluded by the *AT&T Liability Order*.[73] AT&T disputes defendants' suggestion that its earnings in the 1985-1986 monitoring periods are relevant to the issues in this proceeding, and urges that the argument for offsets from underearnings in other monitoring periods be rejected.[74]

31. AT&T adds that defendants' arguments that it has failed to allege and prove violations of the Act and actual damage are unfounded because it has made a sufficient showing of each under traditional principles governing its statutory right to such relief.[75] According to AT&T, the only injury and causation it need show are the injury and causation arising from its payment of excessive rates for services it purchased from defendants during the relevant period.[76] AT&T maintains that it has shown that defendants charged rates that produced earnings in excess of the Commission's prescribed rate of return and argues that its damages are the excessive charges that AT&T paid. AT&T argues that its measure of damages is correct and that it has been damaged regardless of whether or not it may have been able to "pass on" the damages to other parties.[77] Moreover, AT&T claims that the burden is on defendants to show that the full overcharges should not be recovered as damages and that they have failed to meet this burden.[78]

b. Discussion

32. *AT&T v. FCC and Ohio Bell:* The defendants' claims that the holdings in *AT&T v. FCC* and *Ohio Bell* control these proceedings and bar an award of damages to AT&T are without merit for the reasons stated in the *AT&T Liability and Damages Orders*. We emphasized in those orders that the court in *AT&T v. FCC* explicitly acknowledged the Commission's authority to order a carrier to disgorge earnings in excess of a rate of return prescription,[79] finding only the remedy component of the Commission's rate of return prescription (the automatic refund mechanism) to be unlawful.[80] More to the point, we emphasized that "the [*AT&T v. FCC*] opinion does not address Section 208 complaint proceedings nor purport to alter the statutory scheme of the Act or the remedies Congress established therein.[81] Similarly, as we stated in the *AT&T Damages Order*, the *Ohio Bell* decision does not expand upon *AT&T v. FCC* and does not address the Commission's authority to award damages in private complaint actions under Section 208 of the Act.[82]

33. *Illinois Bell:* We also reject defendants' claim that the decision in *Illinois Bell* somehow leaves the Commission only with Section 205 authority in the face of a violation of our rate of return prescription. As we explained in the *AT&T Damages Order*, *Illinois Bell* addresses the Commission's authority under Section 204, not Section 208. [83] The defendants' claim that the *Illinois Bell* decision deprives the Commission of authority to award damages for violations of a valid rate of return prescription has no merit.

34. *Section 201(b) of the Act:* We turn now to the defendants' contention that AT&T's damages claims must be dismissed because AT&T has failed to prove defendants' rates were unjust and unreasonable within the meaning of Section 201(b) of the Act. In the liability section above, we held that the complainant met its burden of proof by establishing that the defendants violated our rate of return prescription.[84] Accordingly, the question before us now is not whether defendants' rates were unjust and unreasonable; rather the question now is whether the complainant suffered any measurable damage as a consequence of paying rates previously determined by the Commission to be unlawful under Section 201(b).

35. *Damages and Offsets:* The defendants' arguments are devoted primarily to attempting to persuade the Commission that AT&T's damages claims are really claims for restitution or refunds governed by equitable or public policy considerations. These considerations, according to defendants, militate against any award of damages to AT&T based on excessive earnings. The defendants argue, in effect, that the damages AT&T seeks are equivalent to refunds that would have been required under the refund mechanism invalidated by the court in *AT&T v. FCC*. We do not agree. We are concerned here with determining whether a particular customer, which has availed itself of a statutory complaint remedy under Title II of the Act, has sustained any measurable damage that can be traced to defendants' violations of the Act. Although a damages award under Section 208 of the Act might well be equal or substantially similar to a refund ordered under Section 204 of the Act,[85] this does not transform a private complaint action into a public enforcement proceeding subject to broad public interest considerations.

Aeronautics Board, 521 F.2d 298 (D.C. Cir. 1975) (*Moss*), *cert. denied sub nom. Roberts v. Civil Aeronautics Board*, 424 U.S. 966 (1976), *reh'g denied*, 425 U.S. 966 (1976). Walnut Hill states that the refund in *Moss* "was governed by the equitable principles governing the law of restitution." Walnut Hill Br. at 14, citing to *Moss*, 521 F.2d at 304. We addressed this argument in the *AT&T Damages Order* and found defendant's reliance on *Moss* to be misplaced. *AT&T Damages Order* at n.60.

[72] Walnut Hill Br. at 16-18.

[73] *See, e.g.*, AT&T RBr.2 at 4.

[74] AT&T Br.1 at 7.

[75] AT&T Br.2 at 2-3.

[76] *See, e.g.*, AT&T Br.1 at 5-7.

[77] AT&T Br.1 at 5-6.

[78] *See, e.g.*, AT&T Br.1 at 5.

[79] *AT&T v. FCC*, 836 F.2d at 1392 ("Thus, as we previously have concluded, the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate of return prescription.").

[80] Indeed, the court in *Ohio Bell* recognized the continuing efficacy of our rate of return framework. *See* 949 F.2d at 868.

[81] *AT&T Liability Order*, 5 FCC Rcd at 148, para. 49.

[82] *AT&T Damages Order* at para. 19.

[83] *Id.* at para. 27.

[84] In the *AT&T Liability Order*, we held that the complainant therein proved that defendants' rates were unjust and unreasonable by proving that the defendants violated our rate of return prescription. *See AT&T Liability Order*, 5 FCC Rcd at 149.

[85] *See Seaboard*, 442 U.S. 444, 455, n.8:

> If a shipper proves a rate is unreasonable and that he was damaged in the full amount he was overcharged, the outcome of a § 13(1) [§ 208] proceeding will be no dif-

36. As in the *AT&T Damages Order*, we find defendants' arguments with respect to "passing-on" equally unavailing. In rejecting this same argument, we said, "[w]hether [complainant] passed on the overcharges or absorbed them does not alter the fact that [complainant] was damaged by paying excessive rates charged by [defendants].[86] The issue is not what AT&T has done in response to paying excessive rates, but whether AT&T has been damaged as a result of these excessive rates.[87]

37. Nor can we accept the defendants' related claim that we should require AT&T to flow through any damages it may receive to its end user customers. Sections 206-209 of the Act give private parties the right to file complaints challenging the acts or omissions of carriers and to recover monetary damages resulting from such acts or omissions. Complainants, however, are charged, as AT&T is in the instant case, with the burden of establishing violations of the Act or Commission rule or order and the amount or extent of damage suffered as a consequence of such violations. Accepting defendants' flow through argument would, in effect, transform AT&T's complaints into class action suits on behalf of its customers, a result neither expressly contemplated by nor consistent with the private remedy created under Sections 206-209 of the Act.

38. We also reject CBT's argument that we should allow CBT to offset AT&T's damages claims with underearnings attributable to AT&T billings outside the 1987-1988 monitoring period. CBT has provided no support or rationale for its contention that we should take into account AT&T's purchases of interstate access services outside the relevant 1987-1988 monitoring period in assessing the damages incurred by AT&T as a result of paying CBT's 1987-1988 rates.

39. After carefully considering the arguments and evidence presented by the parties, we award damages to AT&T from CBT in the amount of $4,931,000. This amount represents, as stipulated by the parties, "AT&T's allocable share of the reduction in revenues which would reduce CBT's rate of return to 12.25 percent, as computed from CBT's October 20, 1989 FCC Form 492."[88] CBT has made no showing that would warrant any offsets to this amount.

40. We award damages to AT&T from Walnut Hill in the amount of $55,429. In reaching this amount, we recalculated AT&T's claim for damages because AT&T erroneously used Walnut Hill's total revenue amount for all interstate access service for the monitoring period as the amount billed to AT&T for access service. Walnut Hill, however, states in responses to interrogatories that it billed AT&T $1,540,000 for interstate access for the 1987-1988 monitoring period.[89] Therefore, we used the Walnut Hill billing amount and determined AT&T's share of interstate access purchases for the monitoring period. AT&T's market share percentage was then multiplied by Walnut Hill's "grossed-up" excess earnings for all interstate access. This product is AT&T's share of the overearnings ($55,429) and is AT&T's damage award.

2. Interest on Damages

a. Contentions of the Parties

41. Defendants' final claim is that AT&T is not entitled to prejudgment interest because such relief is not explicitly referred to or contemplated in Sections 206-209 of the Act. According to defendants, the Commission may award AT&T interest only if it is ordering a refund under Section 204 of the Act. Defendants argue that because the Commission cannot lawfully grant AT&T a refund under the facts of the instant case, no interest can be awarded on AT&T's damages.[90]

42. AT&T argues in reply that, contrary to defendants' assertion, the Commission's authority to award interest in a complaint proceeding is well established. AT&T contends that interest in the instant case is fully appropriate because the Commission, in prescribing a maximum permitted rate of return for the LECs explicitly contemplated that the LEC's overearnings would be subject to interest....[91] In fact, AT&T states, the Commission prescribed the interest rate computation to be applied to excessive earnings.[92]

b. Discussion

43. The defendants have made no argument which persuades us to alter our holding in the *AT&T Damages Order* that the Commission has the authority to order interest in a Section 208 proceedings.[93] We conclude that interest is appropriate in the instant case. AT&T was effectively deprived of the use of the excessive amounts it paid defendants as a result of defendants' unlawful rates while defendants, on the other hand, enjoyed the beneficial use for a substantial period of time of funds to which AT&T rightfully has a claim. We are persuaded that interest is required not only to effect a full and fair remedy for AT&T, which paid rates higher than it would have paid had defendants earned within the prescribed level, but also to avoid any unjust enrichment of defendants stemming from their charging rates that we have determined to be unjust and unreasonable under Section 201(b) of the Act.[94] AT&T is wrong, however, in claiming that an award of interest necessarily flows from our decisions in the CC Docket No. 84-800 proceeding,[95] and therefore, should be

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ferent than that of a § 15(8)(a) [§ 204] proceeding in which the carrier fails to establish the reasonableness of the rate.

86 *AT&T Damages Order* at para. 23.

87 While defendants have asserted that lower charges to complainant would have resulted in lower charges to complainant's customers, they have provided no persuasive evidence in support of this contention.

88 AT&T Br.1 at Exhibit A.

89 Walnut Hill Tel. Co. Answers to First Set of Interrogatories at 2 (filed Mar. 26, 1990).

90 *See, e.g.*, Walnut Hill Br. at 12.

91 AT&T RBr.2 at 7.

92 *Id.*

93 *AT&T Damages Order* at para. 28.

94 *See New England Telephone and Telegraph Co. v. FCC*, 826 F.2d 1101, 1113 (D.C. Cir. 1987), *cert. denied*, 109 S. Ct. 1942 (1989) (carriers may reasonably be required "to pay full interest for earnings they had no right to retain in the first place.").

95 Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985) (*Phase I Order*), *on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986) (*Phase I Reconsideration*), *on further reconsideration*, 2 FCC Rcd 190 (1987).

computed at the rate specified in those proceedings. Just as the courts' decisions regarding the validity of the rate of return mechanism and refunds under Section 204 of the Act do not guide us in this Section 208 proceeding, we are similarly not bound by interest rate computations prescribed in CC Docket No. 84-800. We conclude that interest should be computed at the IRS rate for tax refunds and not at the rate AT&T requests.[96] In addition, we find that interest should begin to accrue from January 1, 1989, the day after the end of the 1987-1988 monitoring period. At that point, defendants were subject to the earnings limitations of a new monitoring period. Accordingly, we award interest calculated at the IRS rate for tax refunds[97] from Cincinnati Bell Telephone Company and Walnut Hill Telephone Company to AT&T from January 1, 1989 until the date of full payment to AT&T.

IV. CONCLUSION

44. We have carefully reviewed the extensive record before us and have found, to the extent indicated here, that complainant is entitled to an award of damages, plus accumulated interest on such damages amount, for Cincinnati Bell Telephone Company's and Walnut Hill Telephone Company's violations of our rate of return prescription for the 1987-1988 monitoring period.

V. ORDERING CLAUSES

45. Accordingly, IT IS ORDERED, pursuant to Section 4(i), 4(j), 201, 206, 207, 208 and 209 of the Communications Act, as amended, 47 U.S.C. §§ 4(i), 4(j), 201, 206, 207, 208 and 209, that the above-captioned complaints filed by American Telephone and Telegraph Company ARE GRANTED to the extent discussed here.

46. IT IS FURTHER ORDERED, that Cincinnati Bell Telephone Company SHALL PAY to American Telephone and Telegraph Company the sum of $4,931,000 (Four million nine hundred thirty-one thousand dollars) 60 days after the release of this Memorandum Opinion and Order; and that Walnut Hill Telephone Company SHALL PAY to American Telephone and Telegraph Company the sum of $55,429 (Fifty-five thousand four hundred twenty-nine dollars) 60 days after the release of this Memorandum Opinion and Order.

47. IT IS FURTHER ORDERED, that Cincinnati Bell Telephone Company and Walnut Hill Telephone Company SHALL PAY interest on the amount of damages awarded here at the IRS rates set forth in Appendix A from January 1, 1989 until the date full payment is made.

48. IT IS FURTHER ORDERED, that the Motion for Summary Decision filed by American Telephone and Telegraph Company against Walnut Hill Telephone Company on July 25, 1990 IS DISMISSED and that the Counter-Motion for Summary Decision filed by Walnut Hill Telephone Company on August 8, 1990 IS DISMISSED.

49. IT IS FURTHER ORDERED, that the Motion to Accept Supplemental Legal Authority Supporting Motion to Motion to Dismiss filed by Cincinnati Bell Telephone Company on October 19, 1990 IS GRANTED.

50. IT IS FURTHER ORDERED, that the Supplement to the Record filed by Cincinnati Bell Telephone Company on October 23, 1992 IS ACCEPTED for filing.

51. IT IS FURTHER ORDERED, that the Motion to Compel filed by Cincinnati Bell Telephone Company on September 10, 1992 IS DENIED.

52. IT IS FURTHER ORDERED, that the Motion to Dismiss filed by Cincinnati Bell Telephone Company on January 12, 1990 IS DENIED, and that the Motion to Dismiss filed by Walnut Hill Telephone Company on January 12, 1990 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[96] We believe that the rationale adopted by the Commission for applying the IRS rate in pole attachment complaint proceedings under Section 204 of the Act, 47 U.S.C. § 204, is equally applicable here. In Teleprompter of Fairmont v. C&P of West Virginia, 79 FCC 2d 232 (1980), the Commission stated

> As a matter of fairness, we believe that the rate of interest applied in a pole attachment complaint proceeding should be readily available, easily applied, and periodically revised to reflect changes in borrowing costs. In light of these considerations, we find the interest rate for federal tax refunds and additional tax payments suitable for use in this type of proceeding. This rate appears in a variety of easily obtained official and commercial publications, and is revised on a regular basis.

79 FCC 2d at 238 [footnote omitted].

[97] The applicable IRS rates are set forth in Appendix A.

APPENDIX A

Effective Period	Rate	Internal Revenue Service Citation
01/01/87 - 03/31/87	8%	Rev.Rul. 146, 1986-2 C.B. 208
04/01/87 - 06/30/87	8%	Rev.Rul. 87-23, 1987-13 I.R.B. 46
07/01/87 - 09/30/87	8%	Rev.Rul. 87-62, 1987-29 I.R.B. 10
10/01/87 - 12/31/87	9%	Rev.Rul. 87-87, 1987-36 I.R.B. 8
01/01/88 - 03/31/88	10%	Rev.Rul. 87-131, 1987-50 I.R.B. 6
04/01/88 - 06/30/88	9%	Rev.Rul. 88-17, 1988-10 I.R.B. 6
07/01/88 - 09/30/88	9%	Rev.Rul. 88-50, 1988-25 I.R.B. 39
10/01/88 - 12/31/88	10%	Rev.Rul. 88-86, 1988-41 I.R.B. 1
01/01/89 - 03/31/89	10%	Rev.Rul. 88-105, 1988-51 I.R.B. 4
04/01/89 - 06/30/89	11%	Rev.Rul. 89-36, 1989-1 C.B. 309
07/01/89 - 09/30/89	11%	Rev.Rul. 89-69, 1989-1 C.B. 310
10/01/89 - 12/31/89	10%	Rev.Rul. 89-99, 1989-2 C.B. 256
01/01/90 - 03/31/90	10%	Rev.Rul. 89-125, 1989-2 C.B. 257
04/01/90 - 06/30/90	10%	Rev.Rul. 90-19, 1990-1 C.B. 186
07/01/90 - 09/30/90	10%	Rev.Rul. 90-47, 1990-1 C.B. 187
10/01/90 - 12/31/90	10%	Rev.Rul. 90-71, 1990-35 I.R.B. 4
01/01/91 - 03/31/91	10%	Rev.Rul. 90-94, 1990-46 I.R.B. 16
04/01/91 - 06/30/91	9%	Rev.Rul. 91-20, 1991-11 I.R.B. 1
07/01/91 - 09/30/91	9%	Rev.Rul. 91-33, 1991-21 I.R.B. 1
10/01/91 - 12/31/91	9%	Rev.Rul. 91-50, 1991-37 I.R.B. 1
01/01/92 - 03/31/92	8%	Rev.Rul. 91-65, 1991-51 I.R.B. 1
04/01/92 - 06/30/92	7%	Rev.Rul. 92-21, 1992-14 I.R.B. 14
07/01/92 - 09/30/92	7%	Rev.Rul. 92-44, 1992-24 I.R.B. 86
10/01/92 - 12/31/92	6%	Rev.Rul. 92-77, 1992-38 I.R.B. 12

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Dial-Net, Inc. File No. I-T-C-93-059-TC

and

LDDS Communications, Inc.

For authority pursuant to Section 214
of the Communications Act of 1934, as
amended, to transfer control of
international resale authorization

MEMORANDUM, OPINION AND ORDER

Adopted: March 5, 1993; Released: March 16, 1993

By the Chief, International Facilities Division:

1. Dial-Net, Inc. (Dial-Net) and LDDS Communications, Inc. (LDDS) filed the above-captioned application on December 23, 1992, pursuant to Section 214 of the Communications Act of 1934, as amended, and Section 63.01 of the Commission's Rules requesting authority to transfer control of Dial-Net and its Section 214 authorization to LDDS. The application was put on public notice on December 30, 1992. No comments were received.

2. Dial-Net is a privately-held South Dakota corporation that has authority to provide international message telecommunications service (IMTS) by the resale of the international switched voice services set forth in AT&T Tariff FCC Nos. 1 and 2, MCI Tariff FCC No. 1, and US Sprint Tariff FCC Nos. 1 and 2 between the U.S. and international points listed in those tariffs.[1] It also provides nationwide domestic interstate long-distance telecommunications service through the resale of other carriers' services pursuant to the Commission's domestic competitive carrier policies.[2] Finally, it provides intrastate service in 18 states pursuant to certification, registration or tariff requirements or on an unregulated basis. Dial-Net claims to be a non-dominant international carrier operating under the regulatory requirements established in *International Competitive Carrier Policies*.[3]

3. LDDS, itself an authorized Section 214 carrier, is a publicly held Tennessee corporation that, through its existing subsidiaries, provides interexchange telephone service to various locations throughout the United States as a non-dominant carrier pursuant to the Commission's domestic competitive carrier policies, and resells international switched voice services and provides direct service to Iran and private line service to Israel pursuant to the regulatory requirements established for non-dominant international carriers in *International Competitive Carrier Policies*.[4] Furthermore, its subsidiaries provide intrastate service in 42 states, either pursuant to certification, registration or tariff requirements, or on an unregulated basis.

4. Dial-Net and LDDS have negotiated an agreement pursuant to which LDDS will acquire all outstanding shares of Dial-Net common stock in exchange for a mixture of cash and equity. Dial-Net will merge into and with a wholly-owned subsidiary of LDDS, LDDS Acquisition Subsidiary, which will be the surviving corporation. LDDS Acquisition Subsidiary will then change its name back to Dial-Net, Inc. and will be a wholly owned subsidiary of LDDS. Neither Dial-Net's name nor the terms and conditions of its services will be affected. Dial-Net will continue to provide services pursuant to its tariff currently on file at the Commission. The transaction will be transparent to Dial-Net's customers and will not cause inconvenience or confusion. The parties argue that their transaction will serve the public interest by permitting LDDS and Dial-Net to realize significant economic and marketing efficiencies which will enhance the ability of these carriers to continue providing high-quality low-cost telecommunications services and to compete more effectively in the international switched voice service marketplace.

5. In view of the foregoing, we conclude that the transfer of control of Dial-Net and its Section 214 authorization to LDDS will not adversely affect the public interest.

6. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01, that the application of Dial-Net, Inc. and LDDS Communications, Inc., File No. I-T-C-

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[1] Dial-Net, Inc., File No. I-T-C-91-081, 6 FCC Rcd 2490 (1991).

[2] Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services and Facilities Authorizations Therefor, First Report and Order, 85 FCC 2d 1 (1980); Second Report and Order, 91 FCC 2d 59 (1982); *recon.*, 93 FCC 2d 54 (1983).

[3] International Competitive Carrier Policies, 102 FCC 2d 812 (1985), *recon. denied*, 60 RR 2d 1435 (1986) (hereinafter *International Competitive Carrier Policies*).

[4] MidAmerican Communications Corporation, File No. I-T-C-91-102-TC, 6 FCC Rcd 4176 (1991); Telamarketing Corporation of Louisiana, File No. I-T-C-90-114-TC, 5 FCC Rcd 7263 (1990); Advantage Companies, Inc., File No. I-T-C-90-008-TC, 5 FCC Rcd 694 (1990); Tele-Fibernet Corporation, File No. 92-177-TC, 7 FCC Rcd 5172 (1992); Prime Long Distance Services, Inc. d/b/a Long Distance for Less, File No. I-T-C-92-040, 7 FCC Rcd 2003 (1992); National Teleservices Company, Inc., File No. I-T-C-91-101, and TRI-J Enterprises, Inc., File No. I-T-C-91-098, 6 FCC Rcd 3605 (1991); American Pioneer Telephone of Texas, Inc., LDDS of Alabama, Inc., LDDS of Arkansas, Inc., LDDS of Indiana, Inc., LDDS of Kansas City, Inc., LDDS of Kentucky, Inc., LDDS-II, Inc., Com-Link 21 Inc., LDDS of Tennessee, Inc., File Nos. I-T-C-90-056-064, 5 FCC Rcd 3230 (1990); AmeriCall Systems of Louisville, File No. I-T-C-90-177, 6 FCC Rcd 241 (1991); First Phone of New England, Inc., File No. I-T-C-89-105, 4 FCC Rcd 5474 (1989); Advanced Telecommunications Corporation, File No. I-T-C-86-099, Mimeo 6047, released July 30, 1986, transferred, File Nos. I-T-C-92-197-AL, I-T-C-92-198-AL, I-T-C-92-203-TC, 7 FCC Rcd 6749 (1992); Directline of Austin, Inc., File No. I-T-C-88-136, Transcall America, Inc., File No. I-T-C-88-135, and Satelco Inc., File No. I-T-C-88-134, 3 FCC Rcd 4348 (1988); Microtel, Inc., File No. I-T-C-86-075, Mimeo No. 4445, released May 13, 1986, transferred, File No. I-T-C-88-123-TC, 3 FCC Rcd 4383 (1988); LDDS Communications, Inc., File No. I-T-C-92-162, DA 93-147, released February 12, 1993.

93-059-TC, IS GRANTED and we consent to the transfer of control of Dial-Net and its Section 214 authorization (*see* n.1) to LDDS.

7. IT IS FURTHER ORDERED, pursuant to Section 203 of the Communications Act, as amended, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, that Dial-Net must continue to maintain tariffs for the services authorized in this order.

8. IT IS FURTHER ORDERED that Dial-Net must file annual reports of overseas telecommunications traffic as required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

9. IT IS FURTHER ORDERED that Dial-Net is limited, under this order, to the provision of international switched voice services by the resale of the international switched voice services set forth in the tariffs specified in the authorization being transferred between the U.S. and the points listed in those tariffs in accordance with the previous authorization (*see* n.1).

10. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

11. This order is issued under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.115, may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2), 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Touch 1 Long Distance, Inc. — File No. I-T-C-93-081-TC

For authority pursuant to Section 214 of the Communications Act of 1934, as amended, to transfer control of international resale authorization

MEMORANDUM, OPINION AND ORDER

Adopted: March 5, 1993; Released: March 16, 1993

By the Chief, International Facilities Division:

1. Touch 1 Long Distance, Inc. (Touch 1) and LDDS Communications, Inc. (LDDS) filed the above-captioned application on January 14, 1993, pursuant to Section 214 of the Communications Act of 1934, as amended, and Section 63.01 of the Commission's Rules requesting authority to transfer control of Touch 1 and its Section 214 authorization to LDDS. The application was put on public notice on January 27, 1993. No comments were received.

2. Touch 1 is a privately-held Alabama corporation that has authority to provide international message telecommunications service (IMTS) by the resale of the international switched voice services set forth in AT&T Tariff FCC No. 1, MCI Tariff FCC No. 1, US Sprint Tariff FCC No. 1, ACC Long Distance Corp. Tariff FCC No. 1, Allnet Tariff FCC No. 5, and ATC Tariff FCC No. 2 between the U.S. and international points listed in those tariffs.[1] It also provides nationwide domestic interstate long-distance telecommunications service through the resale of other carriers' services pursuant to the Commission's domestic competitive carrier policies.[2] Finally, it provides intrastate service in several states pursuant to certification, registration or tariff requirements or on an unregulated basis. Touch 1 claims to be a non-dominant international carrier operating under the regulatory requirements established in *International Competitive Carrier Policies*.[3]

3. LDDS, itself an authorized Section 214 carrier, is a publicly held Tennessee corporation that, through its existing subsidiaries, provides interexchange telephone service to various locations throughout the United States as a non-dominant carrier pursuant to the Commission's domestic competitive carrier policies, and resells international switched voice services and provides direct service to Iran and private line service to Israel pursuant to the regulatory requirements established for non-dominant international carriers in *International Competitive Carrier Policies*.[4] Furthermore, its subsidiaries provide intrastate service in 42 states, either pursuant to certification, registration or tariff requirements, or on an unregulated basis.

4. Touch 1 and LDDS have executed a stock purchase agreement pursuant to which LDDS will acquire 100 percent of Touch 1's stock. Touch 1 will be a wholly owned subsidiary of LDDS. Neither Touch 1's name nor the terms and conditions of its services will be affected. Touch 1 will continue to provide services pursuant to its tariff currently on file at the Commission. The transaction will be transparent to Touch 1's customers and will not cause inconvenience or confusion. The parties argue that their transaction will serve the public interest by permitting LDDS and Touch 1 to realize significant economic and marketing efficiencies which will enhance the ability of these carriers to continue providing high-quality low-cost telecommunications services and to compete more effectively in the international switched voice service marketplace.

5. In view of the foregoing, we conclude that the transfer of control of Touch 1 and its Section 214 authorization to LDDS will not adversely affect the public interest.

6. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01, that the application of Touch 1 Long Distance, Inc. and LDDS Communications, Inc., File No. I-T-C-93-081-TC, IS GRANTED and we consent to the transfer of control of Touch 1 and its Section 214 authorization (*see* n.1) to LDDS.

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[1] Touch 1 Long Distance, Inc., File No. I-T-C-92-082, 7 FCC Rcd 2305 (1992).

[2] Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services and Facilities Authorizations Therefor, First Report and Order, 85 FCC 2d 1 (1980); Second Report and Order, 91 FCC 2d 59 (1982); *recon.*, 93 FCC 2d 54 (1983).

[3] International Competitive Carrier Policies, 102 FCC 2d 812 (1985), *recon. denied*, 60 RR 2d 1435 (1986) (hereinafter *International Competitive Carrier Policies)*.

[4] MidAmerican Communications Corporation, File No. I-T-C-91-102-TC, 6 FCC Rcd 4176 (1991); Telamarketing Corporation of Louisiana, File No. I-T-C-90-114-TC, 5 FCC Rcd 7263 (1990); Advantage Companies, Inc., File No. I-T-C-90-008-TC, 5 FCC Rcd 694 (1990); Tele-Fibernet Corporation, File No. 92-177-TC, 7 FCC Rcd 5172 (1992); Prime Long Distance Services, Inc. d/b/a Long Distance for Less, File No. I-T-C-92-040, 7 FCC Rcd 2003 (1992); National Teleservices Company, Inc., File No. I-T-C-91-101, and TRI-J Enterprises, Inc., File No. I-T-C-91-098, 6 FCC Rcd 3605 (1991); American Pioneer Telephone of Texas, Inc., LDDS of Alabama, Inc., LDDS of Arkansas, Inc., LDDS of Indiana, Inc., LDDS of Kansas City, Inc., LDDS of Kentucky, Inc., LDDS-II, Inc., Com-Link 21 Inc., LDDS of Tennessee, Inc., File Nos. I-T-C-90-056-064, 5 FCC Rcd 3230 (1990); AmeriCall Systems of Louisville, File No. I-T-C-90-177, 6 FCC Rcd 241 (1991); First Phone of New England, Inc., File No. I-T-C-89-105, 4 FCC Rcd 5474 (1989); Advanced Telecommunications Corporation, File No. I-T-C-86-099, Mimeo 6047, released July 30, 1986, transferred, File Nos. I-T-C-92-197-AL, I-T-C-92-198-AL, I-T-C-92-203-TC, 7 FCC Rcd 6749 (1992); Directline of Austin, Inc., File No. I-T-C-88-136, Transcall America, Inc., File No. I-T-C-88-135, and Satelco Inc., File No. I-T-C-88-134, 3 FCC Rcd 4348 (1988); Microtel, Inc., File No. I-T-C-86-075, Mimeo No. 4445, released May 13, 1986, transferred, File No. I-T-C-88-123-TC, 3 FCC Rcd 4383 (1988); LDDS Communications, Inc., File No. I-T-C-92-162, DA 93-147, released February 12, 1993.

7. IT IS FURTHER ORDERED, pursuant to Section 203 of the Communications Act, as amended, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, that Touch 1 must continue to maintain tariffs for the services authorized in this order.

8. IT IS FURTHER ORDERED that Touch 1 must file annual reports of overseas telecommunications traffic as required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

9. IT IS FURTHER ORDERED that Touch 1 is limited, under this order, to the provision of international switched voice services by the resale of the international switched voice services set forth in the tariffs specified in the authorization being transferred between the U.S. and the points listed in those tariffs in accordance with the previous authorization (*see* n.1).

10. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

11. This order is issued under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.115, may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2), 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Association of College and University Telecommunications Administrators, American Council on Education, and National Association of College and University Business Officers

Petition for Clarification — File No. ENF-92-003

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 1993; Released: March 16, 1993

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address the Petition for Clarification (Petition) filed by the Association of College and University Telecommunications Administrators (ACUTA), the American Council on Education (ACE), and the National Association of College and University Business Officers (NACUBO) (collectively the "Joint Higher Education Parties") on February 6, 1992. For the reasons discussed below, we dismiss the Petition on procedural grounds.

II. BACKGROUND

2. On June 14, 1990, the Commission adopted the initial Notice of Proposed Rule Making in CC Docket No. 90-313, in which we proposed specific rules aimed at solving problems in the operator services industry that had persisted despite previous Commission action.[1] Prior to final action by the Commission on the NPRM, Congress passed the Telephone Operator Consumer Services Improvement Act,[2] which was signed into law in October 1990. The purpose of TOCSIA is "to protect consumers who make interstate operator services calls from pay telephones, hotels, and other public locations against unreasonably high rates and anti-competitive practices."[3]

3. Under TOCSIA, this Commission was required, *inter alia*, to conduct a "general" rule making proceeding beyond the scope of the initial *NPRM* and prescribe regulations to implement statutory provisions and establish certain standards and policies, and establish a monitoring/reporting proceeding that would ultimately result in three reports to Congress on the progress in achieving the goals and objectives set forth in TOCSIA.[4] On December 21, 1990, we released a Further Notice of Proposed Rule Making.[5] The rules proposed in the *FNPRM* supplanted those proposed in the initial *NPRM*. On April 9, 1991, after reviewing comments filed by numerous interested parties, the Commission adopted comprehensive regulations regarding certain practices and telephone service offerings of operator service providers and the call aggregators with whom they contract to provide operator services.[6] Among other things, the regulations adopted the statutory definition of "aggregator" as "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services."[7]

4. The Joint Higher Education Parties filed their Petition on February 6, 1992 requesting that we

> make clear that colleges and universities are "aggregators" only with respect to those telephones on their campuses which are available to the public or to transient users of the premises for interstate calls using a provider of operator services (*i.e.*, pay telephones).[8]

On February 18, 1992, American Telephone and Telegraph Company (AT&T) filed an opposition to the Petition in which it argued that the Petition is an untimely request for reconsideration of the determination made by the Commission that colleges and universities are "aggregators."[9] On

[1] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Notice of Proposed Rule Making, 5 FCC Rcd 4630 (1990) (NPRM).
[2] Pub. L. No. 101-435, 104 Stat. 986 (1990) (codified at 47 U.S.C. § 226) (TOCSIA).
[3] S. Rep. No. 439, 101st Cong., 2nd Sess. 1 (1990).
[4] The last report was submitted to Congress on November 13, 1992.
[5] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Further Notice Of Proposed Rule Making, 6 FCC Rcd 120 (1990) (*FNPRM*).
[6] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Report and Order, 6 FCC Rcd 2744 (1991) (*April Report and Order*), *recon. denied*, 7 FCC Rcd 3882 (1992).
[7] 47 C.F.R. § 64.708(b). *See also* 47 U.S.C. § 226(a)(2).
[8] Petition at 1.
[9] AT&T Opposition to Petition for Clarification at 4.

March 2, 1992, the Bureau issued a Public Notice[10] asking interested parties to comment on the Joint Higher Education Parties' request.[11]

III. DISCUSSION

5. While the Joint Higher Education Parties have styled their Petition as a petition for clarification, it is really a petition for reconsideration of the action the Commission took in the *April Report and Order* in CC Docket No. 90-313. Both ACUTA and NACUBO participated in that proceeding by filing comments or reply comments in response to the FNPRM.[12] Specifically, both advocated their position, repeated now in their Petition, that colleges and universities should not be included within the definition of aggregator with respect to telephones located in dormitory rooms. In the *April Report and Order,* however, we specifically found that colleges and universities are clearly within the scope of the definition of aggregator.[13] In so doing, we considered the comments and reply comments filed in response to the *NPRM* and the *FNPRM* by participating parties, including ACE, ACUTA, and NACUBO, the three entities that comprise the Joint Higher Education Parties.[14]

6. Section 405 of the Communications Act provides that "[a] petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of."[15] Section 1.429(d) of the Commission's rules[16] also provides that petitions for reconsideration shall be filed within 30 days from the date of public notice of the action for which reconsideration is sought. Public notice of the *April Report and Order* was given on April 24, 1991.[17] Thus, pursuant to Section 405, petitions for reconsideration of the *April Report and Order* were due no later than May 24, 1991. In the instant case, the Joint Higher Education Parties filed what we have determined to be a petition for reconsideration nearly nine months past the statutory deadline. Except where the Commission fails to provide notice of its decision to parties as required by our rules, we lack authority to extend or waive the statutory 30-day filing period specified in Section 405.[18] There has been no showing by the Joint Higher Education Parties that we failed to provide public notice of the *April Report and Order* in CC Docket No. 90-313, a proceeding in which the Joint Higher Education Parties participated. Therefore, we dismiss the Joint Higher Education Parties' Petition as an untimely petition for reconsideration.

IV. ORDERING CLAUSE

7. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 405, that the Petition filed by the Joint Higher Education Parties on February 6, 1992 IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[10] *See* Public Notice: Association of College and University Telecommunications Administrators Files Petition For Clarification Regarding Classification As "Call Aggregators," 7 FCC Rcd 1926 (Com. Car. Bur. 1992). Upon review of the comments and reply comments filed in response to the Public Notice, it was determined that the parties submitting these comments had not been sufficiently specific with respect to the financial impact and other hardships, if any, that might be created if colleges and universities are treated as aggregators with respect to telephones located in dormitory rooms. Subsequently, the Bureau issued a second Public Notice asking for further comments addressing these issues. *See* Public Notice: Commission Requests Further Comments In the Matter of the Association of College and University Telecommunications Administrators' Petition For Clarification Regarding Classification As "Call Aggregators," 7 FCC Rcd 5209 (Com. Car. Bur. 1992).

[11] In response to the Public Notices, supporting comments were filed by the States of Texas, Florida, and South Carolina, Augsburg College of Minneapolis, Minnesota, and Denison University, Granville, Ohio. The Commission also received letters in advance of the first Public Notice from Abilene Christian University, Abilene, Texas, Idaho State University, Pocatello, Idaho, and Tulane University, New Orleans, Louisiana.

Opposing comments were filed by the Missouri Public Service Commission and AT&T.

[12] In addition, ACE and NACUBO filed joint comments and ACUTA filed comments in response to the *NPRM*.

[13] *See April Report and Order,* 6 FCC Rcd at 2752, para. 15 (footnote omitted) ("We also find that... universities are clearly within the scope of the definition of 'aggregator.'").

[14] *See id.,* 6 FCC Rcd at 2749-50, para. 11 (footnotes omitted, citing to the comments of NACUBO, reply comments of ACUTA, and joint comments of ACE and NACUBO):

> Additionally, many parties filed comments requesting universities... be excluded from the definition of 'aggregator.' Generally, universities argue that they are users of communications services and not sellers of such services. They believe that their students are long-term residential users and should not be grouped with hotel patrons, travelers or hospital patients.

[15] 47 U.S.C. § 405.

[16] 47 C.F.R. § 1.429(d).

[17] A summary of the *April Report and Order* was published in the Federal Register on April 23, 1991. The date of public notice is determined pursuant to Section 1.4 of the Commission's rules, 47 C.F.R. § 1.4. While Section 1.4 has since been modified, public notice was at 3 p.m. Eastern Time after the date of publication, that is, 3 p.m. Eastern Time on April 24, 1991. 47 C.F.R. § 1.4(b) (1991). The first day to be counted to determine the thirty-day period in which petitions for reconsideration could be filed was the day after the day of public notice, that is, April 25, 1991. Petitions for reconsideration were due on or before May 24, 1991.

[18] *See Virgin Islands Telephone Corporation,* 7 FCC Rcd 4238, para. 3 (1992); *Heritage Cablevision Associates of Dallas, L.P. v. Texas Utilities Electric Company,* 7 FCC Rcd 4192, 4193, para. 9 (1992); *Mary R. Krupis,* 5 FCC Rcd 5142, para. 2 (1990) citing *Reuters Ltd. v. FCC,* 781 F.2d 946, 951-952 (D.C. Cir. 1986); *Gardner v. FCC,* 530 F.2d 1086 (D.C. Cir. 1976); and *Richardson Independent School District,* 5 FCC Rcd 3135 (1990), *vacated and remanded on other grounds sub nom. WLOS TV, Inc. v. FCC,* 932 F.2d 993 (D.C. Cir. 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
March 9, 1993

Released: March 16, 1993

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Weston Properties XVIII Limited Partnership
Licensee, Radio Station WKBR(AM)
20 William Street
Wellesley, MA 02181

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY for a FORFEITURE pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

BACKGROUND

On October 22, 1991, you filed an application for assignment of license for WKBR(AM), Manchester, New Hampshire, from Weston Properties XVIII Limited Partnership ("Weston") to WKBR, Inc. (File No. BAL-911022EG). WKBR, Inc., was reported to be wholly-owned by Elizabeth Dodge. On December 2, 1991, a petition to deny the assignment application was filed by Spacetown Communications Corporation ("Spacetown") licensee of WDER(AM), Derry, New Hampshire. Spacetown sought to have the assignment application denied or designated for hearing with an issue, *inter alia,* to determine whether there had been an unauthorized transfer of control of WKBR(AM) to Brian Dodge, the husband of Elizabeth Dodge[1] Oppositions were filed by Weston and WKBR, Inc., and a consolidated reply was filed by Spacetown. On July 22, 1992, before the Commission acted on the petition to deny, you requested that the assignment application be dismissed. This was done by letter dated December 3, 1992. You now have an application pending to assign the license for WKBR(AM) to Robert Miles Bittner (File No. BAL-921030EI).

On September 20, 1991, you entered into a "Management Agreement" with Brian Dodge. You filed the Management Agreement with the Commission, pursuant to Section 73.3613 of the Commission's Rules, on October 21, 1991, the day before the application to assign the license for WKBR(AM) was filed. The initial term of the Management Agreement was from September 20, 1991, to January 20, 1992. The Management Agreement contained provisions which raised questions as to whether there had been an unauthorized transfer of control of the station. Specifically, the Management Agreement required that Brian Dodge pay you $1,275 per month as long as the Management Agreement was in effect. The Management Agreement provided that Brian Dodge would act in your best interest to:

a. Meet FCC's Public Inspection File requirement.

b. Meet FCC's Public Service Announcement requirements.

c. Meet FCC's requirement for News and Public Affairs.

d. Meet the License and operating parameters of FCC's license as granted to Owner by the FCC.

e. Be effective general manager of the station and maintain all assets used or occupied in their present working order and condition. (Contractor accepts all such assets in their "as is" condition.)

f. Do all other acts and to transact any and all business that Contractor may consider useful, necessary, or proper in connection with the management and conduct of hte [sic] business, property, and interests therein.

g. Open all operating cash accounts, utilities, and bendor [sic] service accounts in the name of Contractor and sign, accept, and endorse checks, drafts, bills in relation to the Contractor business.

h. Hire and dismiss employees as necessary in Contractor's judgement.

i. Establish main studio as required by FCC.

j. Sell radio advertising and program time and collect payment therefor.

k. Promote and conduct Public Relations for WKBR.

l. Acquire and maintenence [sic] furniture, furnishings, equipment and supplies.

m. Contract for utilities.

n. Maintain insurance programs, including policies for fire and casualty, group life, health and hospitalization insurance.

o. Take the steps needed to assure compliance with the rules, regulations, policies of the Federal Communications Commission and other government agencies.

The Management Agreement also provided that Brian Dodge would keep all of the station revenue which accrued during the time the Management Agreement was in effect. Brian Dodge was authorized to select and contract for all programs, although the Management Agreement stated that you would not be prevented from rejecting or substituting a program. Brian Dodge had the right to specify advertising rates, subject to your review. The Management Agreement specified that all employees hired would be Brian Dodge's employees and not yours. Finally, the Management Agreement contained a provision that "[n]othing in this Agreement shall serve, or shall be construed to serve, to prevent or hinder [Weston] from retaining and exercising full and

[1] While Spacetown sought the specification of several other issues, those issues related to Brian Dodge rather than Weston.

complete control of the station, including but not limited to its assets, its policies and practices, its personnel, and the programming and advertising broadcast on the Station."

In your opposition to the petition to deny the assignment application, you stated that the Management Agreement was entered into with Brian Dodge in order to allow WKBR(AM), which had been silent for nine months, to resume broadcast operations. You stated that you were in dire financial circumstances and that creditors were not being paid. You also stated that some station property had been seized by creditors, that liens had been placed on some property, and that forced sales of some property had been scheduled. You also claimed that because your principals lacked broadcast management skills and funds, the only way that you could reactivate WKBR(AM) was through the Management Agreement with Brian Dodge. You further stated that you believed that Brian Dodge was an experienced broadcast operator and that he would be able to provide a religious program format on WKBR(AM). You contended that the terms of the Management Agreement provided that you would retain ultimate control over the station including its programming.

By letter dated December 9, 1992, the Mass Media Bureau requested additional information from you because of its concern that an unauthorized transfer of control of WKBR(AM) may have occurred. In response to the Bureau's letter you state that you purchased WKBR(AM) in 1987 for $1.4 million and have lost $600,000 operating the station. You indicate that WKBR(AM) went off-the-air on January 14, 1991, for financial reasons, and that despite your efforts you were unable to resume operation until the Management Agreement was entered into with Brian Dodge. One of your conditions for the Management Agreement was that you not have to expend any funds to acquire programming or to hire employees. You indicate that you approved Brian Dodge's proposed religious format, provided him with access to customer files, identified sources of services and supervised his reinitiation of technical service. Although you acknowledge that Brian Dodge performed the tasks to restore station operation, you claim that he consulted with you. You state that the Management Agreement expired on January 20, 1992, and was not extended or renewed. However, you worked with Brian Dodge for a brief period thereafter and considered hiring two people recommended by him. You did not hire any employees, and the station eventually discontinued operation in March 1992.

You claim that you maintained control of WKBR(AM) because you consulted periodically with Brian Dodge about programming decisions at the station. In addition to initially approving the religious format and the simulcasting of station WWNH(AM), you claim that you told Brian Dodge to cease broadcasting appeals for funds on the station, and to cease discussing matters raised before the FCC on the station. You state that while you maintained partnership accounts, Brian Dodge opened and controlled operating accounts for the station. You also claim that you exerted control over WKBR(AM) by investigating and coordinating the response to allegations concerning the improper use of the station's STL.[2] You claim to have maintained "periodic contact" with Brian Dodge and that you attempted to work with creditors to secure the release of certain files, equipment, leased space and other assets.

You contend in your opposition to the petition to deny that the Commission has allowed a licensee to employ a general manager who proposed to acquire control of the station based on the "dire financial condition of the station." *Fine Arts Broadcasting, Inc.*, 57 FCC 2d 108, 111 (1975). You also argue that when "exceptional and compelling circumstances" exist, a proposed purchaser may act under the supervision of a licensee to assure continued service without effectuating an unauthorized transfer of control. *Mark R. Nablone, Receiver,* 6 FCC Rcd 7529 (Vid. Ser. Div. 1991). You claim that because of your dire financial condition, you were justified in allowing Brian Dodge to operate WKBR(AM). Finally, you contend that you sought the advice of legal counsel and attempted to comply with Commission rules in connection with entering into the Management Agreement and the operation of the station.

UNAUTHORIZED TRANSFER OF CONTROL

Section 310(d) of the Communications Act of 1934, as amended, states in pertinent part:

> No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

Section 73.3540(a) of the Commission's Rules states that "[p]rior consent of the FCC must be obtained for a voluntary assignment or transfer of control."

There is no exact formula by which control of a broadcast station can be determined. In ascertaining whether a transfer of control has occurred, we have traditionally looked beyond the legal title to whether a new entity or individual has obtained the right to determine the basic operating policies of the station. *See WHDH, Inc.*, 17 FCC 2d 856 (1969), *aff'd sub nom. Greater Boston Television Corp. v. FCC,* 444 F.2d 841 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971). Although a licensee may delegate certain functions to an agent or employee on a day-to-day basis, ultimate responsibility for essential station matters, such as personnel, programming and finances, is nondelegable. *Southwest Texas Public Broadcasting Council,* 85 FCC 2d 713, 715 (1981). The Commission has also discouraged prospective purchasers of a station from day-to-day participation in the station's affairs during the pendency of their applications for Commission consent, to avoid the

[2] From approximately September 21, 1991, until March 24, 1992, unlicensed Auxiliary Broadcast Stations operating on 947.5 MHz were used to transmit programming material between WWNH(AM) and WKBR(AM). These transmissions were made in violation of Commission rules and resulted in the imposition of a forfeiture against Harvest Broadcasting, the licensee of WWNH(AM), in the amount of $20,000.

premature assumption of control.[3] *Phoenix Broadcasting Co.*, 44 FCC 2d 838 (1973); *Fine Arts Broadcasting, Inc., supra.*

Based on the information which we have before us, it appears that you effectuated an unauthorized transfer of control of the license for WKBR(AM) to Brian Dodge which lasted from September 20, 1991, until March 1992. During that time you abdicated the responsibility to determine the manner and means of operating the station. By the terms of the Management Agreement and by your own actual conduct, you turned over control of the operation of the station to Brian Dodge. In essence, you leased the license and facilities to Brian Dodge. The Commission has repeatedly held that a licensee that relegates its role to that of a lessor, retaining merely the right to approve a general format and a lessee to run the station violates Section 310(d). *Benito B. Rish, M.D.*, 6 FCC Rcd 2628 (1991); *Salem Broadcasting, Inc.*, 6 FCC Rcd 4172 (MMB 1991).

During the time Brian Dodge was operating the station you did not have any station employees and you do not know whether Dodge had any station employees. Moreover, Dodge contracted for all station services, paid all station expenses, collected all station revenue and merely paid you a monthly lease fee. As you readily admit, you entered into this arrangement because it would involve no financial responsibility on your part. In addition, Brian Dodge established the station format and provided all the programming for the station. Your acquiescence in the format choice and claimed objection to some programming broadcast by Brian Dodge does not indicate that you exercised control over station programming. Your argument that you maintained control by virtue of the Management Agreement is without merit. It is specifically contradicted by other terms in the Agreement and by the totality of circumstances including the facts that Dodge collected all the revenues, paid all the expenses, selected all the programming, and hired the employees, if any.

We do not agree with your belief that *Fine Arts Broadcasting, Inc., supra,* and *Mark R. Nablone, Receiver, supra,* sanction the unauthorized transfer of control which occurred here merely because you were having financial problems. In *Fine Arts* the Commission specifically stated that we "wish to make it clear that, in the future, prospective purchasers will not be permitted to assume managerial positions at stations they are seeking to acquire unless exceptional and the most compelling circumstances are shown." *Fine Arts Broadcasting, Inc.*, 57 FCC 2d at 111. Not only was Brian Dodge not the proposed buyer, but the Management Agreement gave him control over the station far beyond that of a general manager. Moreover, no attempt to show "compelling circumstances" was made to the Commission until after the petition to deny was filed. Finally, there was no receiver appointed by a court to run the station and insure continued operation as in *Mark R. Nablone, Receiver, supra.*

In view of the circumstances outlined above, it appears that Weston Properties XVIII Limited Partnership has violated both the Communications Act of 1934, as amended, and the Commission's rules by effectuating an unauthorized transfer of control of the license of WKBR(AM), Manchester, New Hampshire, to Brian Dodge. Pursuant to the *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991) (*Policy Statement*), *recon. denied*, FCC 92-212, released June 4, 1992, *Erratum*, released June 11, 1992, the base amount of a forfeiture for an unauthorized substantial transfer of control is $20,000. We have taken into consideration as a downward adjustment factor, the fact that you exhibited good faith when you reported the existence of the Management Agreement to the Commission as required by our rules. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, you are hereby advised of your apparent liability for a forfeiture of eight thousand dollars ($8,000) for your apparent willful violation of Section 310(d) of the Communications Act of 1934, as amended, and Section 73.3540(a) of the Commission's Rules. As stated above, the amount specified has been reached after consideration of the factors set forth in Section 503(b)(2)(D) of the Communications Act of 1934, as amended. In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. §1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[3] The proposed buyer, WKBR, Inc., was wholly owned by Elizabeth Dodge. However, you have conceded that her interests should be wholly attributed to her husband Brian Dodge.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CRESCOMM TRANSMISSION SERVICES, INC. FILE NO. ITC-93-012

For Authority Pursuant to Section 214 of the Communications Act of 1934 to Establish and Operate Channels of Communication Between the United States and the Russian Satellites, Statsionar and Statsionar 11 for the Provision of International Communications

ORDER AND AUTHORIZATION

Adopted: March 3, 1993; Released: March 16, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed by Crescomm Transmission Services, Inc. (Crescomm), pursuant to Section 214 of the Communications Act of 1934, as amended, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-012 IS GRANTED, and Crescomm is authorized to establish nine (9) 64-Kbps circuits over Statsionar 4, located at 14^0 W.L., and two (2) 64-Kbps circuits over Statsionar 11, located at 11^0 W.L., for the provision of international private line voice, and data services not interconnected with the public switched network, and two (2) 36-MHz channels over each satellite for the provision of full-time and occasional video services, between the U.S. and currently authorized international points of communication listed in Appendix A as well as those points which the Commission may authorize in the future to be served by Statsionar 4 and Statsionar 11 satellites.

3. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61 for the services authorized in this order.

4. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

5. IT IS FURTHER ORDERED that the applicant shall file separate Section 214 applications to establish any additional circuits over the Statsionar 4 or Statsionar 11 satellite.

6. IT IS FURTHER ORDERED that neither the applicant nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which the applicant or any persons or companies controlling it or controlled by it are parties.

7. IT IS FURTHER ORDERED that the authority granted herein for the applicant to establish channels of communication between the earth stations in the U.S. and Statsionar 4 and Statsionar 11 satellites does not dispense with the requirement that all such earth stations shall be authorized under Title III of the Communications Act of 1934, as amended, to communicate with those satellites for the provision of the service(s) authorized herein.

8. IT IS FURTHER ORDERED that any authorization of the applicant to provide private lines is limited to the provision of such private lines only between the United States and the countries listed in Appendix A -- that is, private lines which originate in the United States and terminate in the countries listed in Appendix A or which originate in the countries listed in Appendix A and terminate in the United States. In addition, the applicant may not -- and the applicant's tariff must state that the applicant's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched services, unless authorized to do so by the Commission upon a finding that the foreign administrations afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates,* Phase II, First Report and Order, 7 FCC Rcd 559 (1991), and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992).

9. IT IS FURTHER ORDERED that the continued effectiveness of this authorization is conditioned on the outcome of the review after six months by the State Department and the Commission as specified in paragraph 11 of the Commission's Order DA 91-621 (*See* 6 FCC Rcd 2932 (1991)). If the Commission is notified by the State Department that the continued use of the Statsionar 4 or 11 is no longer in the national interest, then this authorization will be subject to cancellation.

10. IT IS FURTHER ORDERED that the applicant shall submit monthly reports detailing the number and capacity of private line circuits in use over the Statsionar 4 and 11. The reports shall also set forth the number of private line circuits the applicant has in use over each communications system for the countries served by Statsionar 4 and 11. These reports shall be filed no later than the 20th day of each month and shall include the required information for the previous month.

11. This authorization is not to be construed as permitting the provision of any services between earth stations located within the U.S.

12. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between the applicant and its correspondent in each of the countries to which it is authorized to provide service, and the applicant shall file copies of the agreement with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51, and in *Regula-*

tion of International Accounting Rates, Phase II, First Report and Order, 57 Fed. Reg. 646 (1992) (to be codified at 47 C.F.R. §43.51(a)(3)).

13. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX A

Statsionar 4 and 11

Albania
Armenia
Azerbaijan
Belarus
Bulgaria
Czechoslovakia
Estonia
Georgia
Hungary
Kazakhstan
Kyrgyzstan
Latvia
Lithuania
Moldova
Poland
Romania
Russian Fed.
Tajikistan
Turkmenistan
Ukraine
Uzbekistan

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-46

In the Matter of

Amendment of Section 73.202(b), RM-8187
Table of Allotments,
FM Broadcast Stations.
(American Falls, Idaho)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 22, 1993; Released: March 17, 1993

Comment Date: May 7, 1993
Reply Comment Date: May 24, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Dobson, Goss, Rones & Dahl ("petitioner"), requesting the substitution of Channel 281C1 for Channel 281A at American Falls, Idaho, and the modification of Station KOUU(FM)'s construction permit to specify operation on the higher class channel.

2. We believe the public interest would be served by proposing the substitution of Channel 281C1 for Channel 281A at American Falls since it could provide the community with a wide coverage area FM service. Channel 281C1 can be allotted at American Falls in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.6 kilometers (2.8 miles) southeast at Station KOUU(FM)'s construction permit site.[1] The site restriction avoids a short-spacing to Station KVEZ(FM), Channel 280A, Smithfield, Utah. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 281C1 at American Falls or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
American Falls, Idaho	281A	281C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 7, 1993,** and reply comments on or before **May 24, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Jerome J. Dobson
Dobson, Goss, Rones & Dahl
7121 Maryland
St. Louis, MO 63130
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 281C1 at American Falls are North Latitude 42-45-24 and West Longitude 112-48-38.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-218

In the Matter of

Amendment of Section 73.202(b),	RM-8053
Table of Allotments,	RM-8054
FM Broadcast Stations.	RM-8143
(Olathe, Silver Lake and Topeka, Kansas)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 19, 1993; Released: March 17, 1993

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 6367 (1992), issued in response to two separately filed and mutually exclusive petitions for rule making. The first proposal, filed by Bott Broadcasting Company ("Bott"), requested substitution of Channel 222C3 for Channel 222A at Olathe, Kansas, and modification of its construction permit for Station KCCV-FM to specify operation on Channel 222C3.[2] To accommodate the upgrade at Olathe, Bott also requested the substitution of Channel 257A for Channel 223A at Topeka, Kansas (RM-8053). The second proposal, filed by Margaret Escriva ("Escriva"), permittee of Station KESC(FM), Topeka, Kansas, proposed the substitution of Channel 223C3 for Channel 223A at Topeka, Kansas, and modification of her construction permit accordingly (RM-8054). New Horizons Foundation, Incorporated ("New Horizons") filed a counterproposal.[3] Bott and Escriva filed a joint settlement agreement and reply comments. After the close of the comment period, Escriva filed reply comments and New Horizons filed supplemental comments.[4]

2. New Horizons counterproposed the allotment of Channel 257A to Silver Lake, Kansas, as that community's first local service. New Horizons also requested reservation of the channel for noncommercial educational use. In support of its request, New Horizons states that Silver Lake is an incorporated community with a mayor-council form of government. The community has a fire and police department and schools and has a 1990 population of 1,390. Further, New Horizons is a chartered nonprofit educational foundation that desires to provide traditional religious programming to the community. According to New Horizons, there are essentially no noncommercial educational channels available for allotment at Silver Lake because of the stations operating in the Kansas City, Missouri, and Topeka, Kansas, area. New Horizons states that it will file an application for Channel 257A at Silver Lake with or without reservation of the channel.

3. Bott and Escriva state that their settlement agreement would resolve the mutual exclusivity between Olathe and Topeka through a dismissal of Escriva's proposal (RM-8054).[5] Escriva consents and agrees to the substitution of Channel 257A for Channel 223A at Topeka and modification of her construction permit accordingly. The substitution of channels at Topeka will allow Bott to upgrade Station KCCV-FM to the higher class channel.

4. In response to the counterproposal filed by New Horizons, Bott suggests that Channel 223A be allotted to Silver Lake at the city reference coordinates to accommodate its settlement with Escriva. It states that this solution would obviate the need for further litigation and would result in a first local service for Silver Lake and expanded service for Olathe. In their reply comments, Escriva and New Horizons support this suggestion. New Horizons states that it will apply for Channel 223A if allotted.

5. Based on the above information, we believe the public interest would be served by accepting the settlement agreement, substituting Channel 222C3 for Channel 222A at Olathe, Kansas and modifying Station KCCV-FM's construction permit accordingly. In addition, pursuant to the agreement, we will dismiss Escriva's proposal. A staff engineering analysis has determined that Channel 222C3 can be allotted to Olathe, Kansas, at petitioner's specified site.[6] To accommodate the upgrade at Olathe, we shall substitute Channel 257A for Channel 223A at Topeka, Kansas, as agreed by Escriva and modify Escriva's construction permit for Channel 223A to specify operation on Channel 257A.[7] We shall also allot Channel 223A to Silver Lake, Kansas, as that community's first local service. Channel 223A can be allotted to Silver Lake in compliance with the Commission's spacing requirements without a site restriction.[8] We will not reserve the channel for noncommercial educational use as there is neither a TV Channel 6 interference problem nor a Canadian border problem. *See Siloam Springs, Arizona*, 2 FCC Rcd 7485 (1987). Further, a Com-

[1] The community of Silver Lake, Kansas, has been added to the caption.

[2] An application for the assignment of the construction permit of Station KCCV-FM, Olathe, from Marianne S. Harbart to Bott Broadcasting Company was granted on July 1, 1992 (BAPH-920515HC). Ms. Harbart filed a statement consenting to the filing of the rule making petition.

[3] Public Notice of the counterproposal was given on December 29, 1992, Report No. 1922 (RM-8143).

[4] Because these comments support an agreement which resolves conflicting issues in this case, we believe acceptance is in the public interest. *See* Commission Rule 1.415(d).

[5] The settlement agreement is submitted for approval pursuant to Section 1.420(j) of the Commission's Rules. An exhibit is enclosed stating that Escriva is not to receive any money or other consideration in excess of her legitimate expenses in connection with her rulemaking proposal.

[6] The coordinates for Channel 222C3 at Olathe are 38-58-46 and 94-50-44.

[7] The coordinates for Channel 257A at Topeka are 39-02-56 and 95-40-32.

[8] The coordinates for Channel 223A at Silver Lake are 39-06-12 and 95-51-36.

mission engineering analysis indicates that reserved noncommercial Channel 206 is available for use at Silver Lake using reduced facilities.

6. Commission policy requires reimbursement to affected stations for the reasonable costs associated with changing frequencies. *See Circleville and Columbus, Ohio*, 8 FCC 2d 159 (1967). Bott has stated its intention to reimburse Escriva for all reasonable expenses incurred in changing her frequency to the new channel.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 30, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

Community	Channel No.
Olathe, Kansas	222C3
Topeka, Kansas	247C, 257A, 262C, 295C, 299C
Silver Lake, Kansas	223A

8. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station KCCV-FM, Olathe, Kansas, IS MODIFIED to specify operation on Channel 222C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316(a) of the Communications Act of 1934, as amended, that the construction permit for Channel 223A, Topeka, Kansas, IS MODIFIED, to specify operation on Channel 257A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Permit BPH-871124MG except for the channel as specified above. Any changes, except those specified require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with Permit BPH-871124MG, except for the channel as specified above, and a license application (Form 302) is filed within 10 days of commencement of program tests.

10. IT IS FURTHER ORDERED, That the secretary of the Commission shall send by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Meredith S. Senter, Jr.
Stephen D. Baruch
Leventhal, Senter & Lerman
2000 K Street, N.W., Suite 600
Washington, D.C. 20006-1809
(counsel for Margaret Escriva)

Marianne S. Harbart
12637 Pawnee Lane
Leawood,
Kansas 66209

11. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Bott Broadcasting Company, permittee of Station KCCV-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

12. IT IS FURTHER ORDERED, That the Request for dismissal of the petition filed by Margaret Escriva IS GRANTED (RM-8054).

13. The window period for filing applications for Channel 223A at Silver Lake will open on **May 3, 1993,** and close on **June 1, 1993.**

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

15. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-45

In the Matter of

Amendment of Section 73.202(b), RM-8186
Table of Allotments,
FM Broadcast Stations.
(Kealakekua, Hawaii)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 22, 1993; Released: March 17, 1993

Comment Date: May 7, 1993
Reply Comment Date: May 24, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Visionary Related Entertainment, Inc. ("petitioner"), requesting the substitution of Channel 268C1 for Channel 268C3 at Kealakekua, Hawaii, and the modification of Station KAOY(FM)'s construction permit to specify operation on the higher class channel.

2. We believe the public interest would be served by proposing the substitution of Channel 268C1 for Channel 268C3 at Kealakekua since it could provide the community with a wide coverage area FM service. Channel 268C1 can be allotted at Kealakekua in compliance with the Commission's minimum distance separation requirements with a site restriction of 21.8 kilometers (13.6 miles) north of the community.[1] In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 268C1 at Kealakekua or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Kealakekua, Hawaii	268C3	268C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 7, 1993,** and reply comments on or before **May 24, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Peter A. Casciato
1500 Sansome Street, Suite 201
San Francisco, CA 94111
(Attorney for Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 268C1 at Kealakekua are North Latitude 19-42-56 and West Longitude 155-55-00.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-28

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Colonial Heights, Tennessee) RM-8172

NOTICE OF PROPOSED RULE MAKING

Adopted: February 16, 1993; Released: March 17, 1993

Comment Date: May 7, 1993
Reply Comment Date: May 24, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Murray Communications, permittee of Channel 290A, Colonial Heights, Tennessee, requesting the substitution of Channel 290C3 for Channel 290A at Colonial Heights and modification of petitioner's authorization to specify operation on the higher powered channel. Petitioner states it will apply for channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 290C3 for Channel 290A at Colonial Heights, since it could provide the community with a wide coverage area FM service. Channel 290C3 can be allotted to Colonial Heights in compliance with the Commission's minimum distance separation requirements with a site restriction of 16.7 kilometers (10.4 miles) southwest to accommodate petitioner's desired site.[1] As requested, we also propose to modify petitioner's authorization for Channel 290A at Colonial Heights to specify operation on Channel 290C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Colonial Heights or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Colonial Heights, Tennessee	290A	290C3

[1] The coordinates for Channel 290C3 at Colonial Heights are North Latitude 36-21-11 and West Longitude 82-35-24.

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 7, 1993,** and reply comments on or before **May 24, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Timothy K. Brady, Esq.
P.O. Box 986
Brentwood, Tennessee 37027-0986
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-241

In the Matter of

Amendment of Section 73.202(b), RM-8084
Table of Allotments,
FM Broadcast Stations.
(Camas, Washington and Seaside, Oregon)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 18, 1993; Released: March 17, 1993

By the Chief, Allocations Branch:

1. At the request of Pacific Northwest Broadcasting Corporation, ("petitioner"), permittee of Station KMUZ-FM, the Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause,* 7 FCC Rcd 6823 (1992), proposing the substitution of Channel 234C2 for Channel 234C3 at Camas, Washington, and the modification of Station KMUZ-FM's construction permit accordingly.[1] In order to accommodate the upgrade, petitioner also requested the substitution of Channel 235A for Channel 234A at Seaside, Oregon, and the modification of Station KQEM(FM)'s construction permit accordingly.[2] Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted. In response to the *Order to Show Cause,* Monte Corporation, permittee of Station KQEM(FM), Channel 234A, Seaside, Oregon, filed a proposal requesting the substitution of Channel 251A in lieu of proposed Channel 235A at Seaside and the modification of its construction permit accordingly. No other comments were received.

2. In its proposal, Monte claims that the substitution of Channel 251A in lieu of Channel 235A at Seaside would allow Station KQEM(FM) an opportunity to upgrade "in the near future." Monte notes that an application for Station KING-FM, Channel 251C, Seattle, Washington, to modify its construction permit site has been granted.[3] Monte asserts that the change of Station KING-FM's transmitter site will permit a future upgrade for Station KQEM(FM) at Seaside. Monte states that the substitution of Channel 251A would require that Station KQEM(FM) change its transmitter site. Therefore, Monte argues that although petitioner acknowledges its obligation to reimburse Monte for reasonable costs incurred to change its frequency, petitioner should also be obligated to reimburse Monte for costs incurred to relocate its transmitter site, citing to *Milan, et al. Georgia,* 6 FCC Rcd 5793 (1991) and *Circleville, Ohio,* 8 FCC 2d 159 (1967). Accordingly, Monte contends that since the substitution of Channel 251A at Seaside would permit petitioner to accomplish its upgrade, as well as provide Station KQEM(FM) an opportunity for future expansion, the Commission should order the petitioner to reimburse Monte for costs to relocate its transmitter site. Monte indicates its willingness to negotiate in good faith with petitioner to determine reimbursement for reasonable expenses.

3. In its comments, petitioner does not object to Station KQEM(FM)'s request for the substitution of Channel 251A in lieu of Channel 235A at Seaside. However, petitioner contends that if, pursuant to Monte's request, the Commission allots a Class A channel that because of spacing requirements necessitates a change in Station KQEM(FM)'s construction permit site, petitioner is not obligated to reimburse Monte for any expenses incurred in changing channels or relocating its transmitter site. Petitioner asserts that Monte's reliance on *Milan* and *Circleville, supra,* is misplaced. Petitioner argues it would not have been able to propose its upgrade at Camas if the proposed substitution of Channel 235A for Channel 234A at Seaside necessitated that Station KQEM(FM) involuntarily change its transmitter site, citing *Claremore, Oklahoma, et al.,* 3 FCC Rcd 4037 (1988). Petitioner reiterates its willingness to reimburse Monte for reasonable and prudent costs incurred in changing channels "at its existing transmitter site."

4. We believe that the public interest would be served by the substitution of Channel 234C2 for Channel 234C3 at Camas, Washington, since it would enable Station KMUZ-FM to expand its coverage area. In order to accommodate the upgrade, and to accommodate Monte's request, we will substitute Channel 251A for Channel 234A at Seaside, Oregon, as requested by Monte. Our engineering analysis confirms that Channel 234C2 can be allotted to Camas, Washington, in compliance with the Commission's minimum distance separation requirements at the petitioner's specified site with a site restriction of 28.7 kilometers (17.8 miles) east of the community.[4] Additionally, Channel 251A can be allotted to Seaside, Oregon, with a site restriction of 10.1 kilometers (6.3 miles) south of the community.[5] As requested, we will also modify Stations KMUZ-FM and KQEM(FM)'s construction permits to specify operation on Channels 234C2 and 251A, respectively. Since both Camas, Washington, and Seaside, Oregon, are located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence by the Canadian government has been obtained.

5. With respect to the issue of reimbursement, we will require that petitioner reimburse Monte for the reasonable costs associated with the change in frequency for Station KQEM(FM). Petitioner is not required to reimburse Monte for the costs it incurs for relocating Station KQEM(FM)'s

[1] We note that petitioner's application (BMPH-920831IH) to modify Station KMUZ-FM's construction permit was granted on October 23, 1992.

[2] As indicated in the *Notice,* petitioner stated in its petition that the construction permit (File No. BPH-880310MN) for Station KQEM(FM) has been assigned to the Monte Corporation ("Monte") and the call letters changed to KBRD(FM). However, the Commission records show that Monte's request to change the station's call letters to KBRD(FM) is still pending. The application (File No. BAPH-911205EC) for assignment of Station KQEM(FM)'s construction permit was granted on January 15, 1992 and consummated on April 17, 1992.

[3] The application (File No. BPH-920707ID) to modify Station KING-FM's transmitter site was granted on November 10, 1992.

[4] The coordinates for channel 234C2 at Camas are North Latitude 45-32-20 and West Longitude 122-02-24.

[5] The coordinates for Channel 251A at Seaside are North Latitude 45-54-35 and 123-56-07.

transmitter site. *See Circleville, supra.* Although Commission policy requires reimbursement for the reasonable costs associated with the change in frequency of an existing authorization, it does not require reimbursement for the cost of relocating that station's transmitter at its own request. Accordingly, we will not order petitioner to reimburse Monte for Monte's requested change of Station KQEM(FM)'s transmitter site. Reimbursement of costs incurred by the affected station, both technical and promotional, is left to the good faith negotiation of the parties involved. Parties are expected to reach a reasonable and equitable agreement in an expeditious manner. It is not the Commission's policy to mediate, at the outset, claims to establish the amount of reimbursement. The Commission will do so only as a last resort. *See, e.g., Harold A. Jahnke,* 46 RR 2d 659 (1979), *Mayfield and Wickliff, Kentucky,* 48 RR 2d 1232 (1981).

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 30, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Camas, Washington,	234C2
Seaside, Oregon	251A

7. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Pacific Northwest Broadcasting Corporation for Station KMUZ-FM, Camas, Washington, IS MODIFIED to specify operation on Channel 234C2, in lieu of Channel 234C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

8. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Pacific Northwest Broadcasting Corporation, permittee of Station KMUZ-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

9. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Monte Corporation for Station KQEM(FM), Seaside, Oregon, IS MODIFIED to specify operation on Channel 251A in lieu of Channel 234A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KQEM(FM)'s construction permit BPH-0880310MN, except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with construction permit, BPH-880310MN, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-362

In the Matter of

Amendment of Section 73.202(b), RM-7873
Table of Allotments,
FM Broadcast Stations.
(Jourdanton, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 23, 1993; Released: March 17, 1993

By the Chief, Allocations Branch:

1. At the request of Seventh Day Christian Group ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 43 (1992), proposing the allotment of Channel 239A to Jourdanton, Texas, as the community's first local FM service. Petitioner filed comments supporting the allotment at Jourdanton. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 239A to Jourdanton, since it could provide the community with its first aural transmission service. Channel 239A can be allotted to Jourdanton in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] Since Jourdanton is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence of the Mexican government has been obtained for this allotment.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 30, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Jourdanton, Texas	239A

4. The window period for filing applications will open on **May 3, 1993,** and close on **June 1, 1993**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

[1] The coordinates for Channel 239A at Jourdanton are North Latitude 28-54-48 and West Longitude 98-32-36.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-181

In the Matter of

Amendment of Section 73.202(b),	RM-7696
Table of Allotments,	RM-7817
FM Broadcast Stations.	
(Ashland, California, Rolla	
and Monroe City, Missouri)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 25, 1993; Released: March 17, 1993

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 3727 (1991), proposing the substitution of FM Channel 232C2 for Channel 232A at California, Missouri, and modification of the license for Station KZMO-FM to specify operation on the new channel. The *Notice* was issued in response to a petition filed by Town and Country Communications, Inc. ("Town and Country"). Sobocomo Radio, Inc. ("Sobocomo") filed a counterproposal.[2] Town and Country and Progressive Broadcasting Company of Missouri ("Progressive") filed comments. Sobocomo, Town and Country and Progressive filed reply comments. Town and Country, Progressive and Sobocomo filed a settlement agreement.[3]

2. In comments, Town and Country continues to support the allotment of Channel 232C2 at California, Missouri. Town and Country contends that the substitution of channels will provide improved service to the residents of California and would greatly expand Station KZMO-FM's service area. To accommodate Channel 232C2 at California, Town and Country proposes the substitution of Channel 292A for Channel 232A at Rolla, Missouri, and modification of the license for Station KQMX(FM), accordingly. Town and Country indicates its willingness to reimburse Station KQMX(FM) for the reasonable costs associated with the channel change at Rolla.

3. Progressive, licensee of Station KQMX(FM), Rolla, filed comments stating it has no objection to the substitution of channels, provided a satisfactory agreement is reached between Town and Country and Progressive regarding reimbursement costs.

4. Sobocomo, permittee of a new radio station at Ashland, Missouri, counterproposes the substitution of Channel 291C1 for Channel 291C2 at Ashland and modification of its construction permit to specify operation on the higher class channel. To accommodate the upgrade at Ashland, Sobocomo requests the substitution of Channel 298A for Channel 292A at Monroe City, Missouri, and modification of the license for Station KDAM(FM)'s license to specify operation on Channel 298A. Sobocomo states its intention to reimburse the licensee of Station KDAM(FM) for its reasonable expenses associated with the substitution of channels at Monroe City.

5. Sobocomo, in reply comments, continues to support the allotment of Channel 291C1 at Ashland, Missouri.[4] According to Sobocomo, upgrading the facilities at Ashland will provide service to an additional 112,606 persons. Sobocomo also states that Channel 298A can be allotted to Monroe City as a six kilowatt channel instead of the three kilowatts currently authorized for Channel 292A which could provide service to an additional 4,708 persons.

6. After a review of the proposals, we believe California and Ashland are each deserving of expanded service. A staff engineering analysis indicates that Channel 232C2 can be substituted for Channel 232A at California, Missouri, at Town and Country's specified site provided Channel 292A is substituted for Channel 232A at Rolla, Missouri, or Channel 291C1 can be substituted for Channel 291C2 at Ashland, Missouri, at Sobocomo's requested site provided Channel 298A is substituted for Channel 292A at Monroe City, Missouri. However, both upgrades cannot be granted in compliance with the Commission's spacing requirements. Therefore, we must be guided by the allotment criteria set forth in *Revision of FM Policies and Procedures*, 90 FCC 2d 88 (1982).

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[1] The communities of Ashland and Monroe City, Missouri, have been added to the caption.

[2] Public Notice of the counterproposal was given on October 23, 1991, RM-7817 (Report No. 1863). This was a correction to the public notice released on October 7, 1991, to show the correct nature of the petition for rule making.

[3] On October 16, 1992, Town & Country, Progressive and Sobocomo filed supplemental comments and a settlement agreement in an attempt to resolve the conflicts in this proceeding. We will not accept the settlement agreement. The settlement agreement proposed the substitution of Channel 232C2 for Channel 232A at California, Missouri, substitution of Channel 292A for Channel 232A at Rolla, Missouri, at a new site, substitution of Channel 298A for Channel 292A at Monroe City, Missouri and substitution of Channel 291C1 for Channel 291C2 at Ashland, Missouri, at a new site. It also proposed a new site for vacant Channel 290A at Wheeling, Missouri, to accommodate the above substitutions. Although our engineering analysis indicates that the settlement agreement would resolve existing short spacings in this proceeding, the introduction of the community of Wheeling, which was not part of the initial proposal or Sobocomo's counterproposal, constitutes an untimely filed counterproposal. *See* Section 1.420(d) of the Commission's Rules and the *Appendix* to the *Notice; Grenada, Artesia and Okolona, Mississippi*, 7 FCC Rcd 4838 (1992). Since the settlement includes this proposal, we cannot accept it as filed. Upon final resolution of this proceeding, Sobocomo may file a new petition proposing the upgrade at Ashland and a new site for the channel at Wheeling.

[4] In its reply comments, Sobocomo also suggests the substitution of Channel 276C3 for Channel 232A at Rolla, Missouri, and modification of the license for Station KQMX(FM), accordingly. The proposal for Channel 276C3 at Rolla constitutes an untimely filed counterproposal. Counterproposals must be filed during the initial comment stage. They will not be considered if advanced in reply comments. *See* Section 1.420(d) of the Commission's Rules and the *Appendix* to the *Notice*. Furthermore, Sobocomo proposes to substitute Channel 276C3 for Channel 292A at Rolla, Missouri, although no interest has been expressed in a Class C3 channel at Rolla by Progressive.

(1) First full-time aural service;

(2) Second full-time aural service;

(3) First local service; and

(4) Other public interest matters.

[Co-equal weight given to priorities (2) and (3)]

After examining the conflicting proposals, we find no showing of first or second full-time aural service would be provided. Since both California and Ashland have existing FM stations, neither proposal will provide a first local service under priority three. In view of the foregoing, we believe it is appropriate to base our determination on which modification proposal should prevail under priority four of the allotment criteria, other public interest matters. This criterion permits the Commission to compare the extended service areas proposed by each proponent. *See, Greenup, Kentucky and Athens, Ohio,* 2 FCC Rcd 4319 (1987), *aff'd. in relevant part,* 4 FCC Rcd 3843 (1989). We conducted our own engineering and population analyses to determine which proposal could provide a new service to the largest population within the gain area of the predicted C1 contour at Ashland, as well as the C2 contour at California.

7. After considering the results of our analyses, we conclude that the California proposal should be adopted. We believe our decision, based on a comparison of the population within the predicted gain areas, will bring the benefits of a new service to the greater number of people. A comparison of the population totals indicates that adoption of the California proposal would result in service to an additional 129,178 persons in a 2,591 square mile area, whereas the Ashland proposal would result in service to an additional 120,616 persons in a 3,063 square mile area. Therefore, the counterproposal filed by Sobocomo to upgrade on Channel 291C1 at Ashland, Missouri, will be denied. We will allot Channel 232C2 to California, Missouri, and modify the license of Station KZMO-FM accordingly.

8. We believe the public interest will be served by the substitution of Channel 232C2 for Channel 232A at California, Missouri. Channel 232C2 can be allotted to California in compliance with the minimum distance separation requirements of the Commission's Rules at Town and Country's specified site.[5] To accommodate Channel 232C2 at California, we shall substitute Channel 292A for Channel 232A at Rolla, Missouri, and modify the license for Station KQMX(FM) to specify operation on Channel 292A.[6] Town and Country has acknowledged its responsibility to reimburse Station KQMX(FM) for the reasonable costs in changing frequency. We shall also modify the license of Station KZMO-FM, Channel 232A, to specify operation on Channel 232C2 in accordance with Section 1.420(g) of the Commission's Rules.

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 30, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
California, Missouri	232C2
Rolla, Missouri	287C1, 292A

10. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KZMO-FM, Channel 232A, California, Missouri, IS MODIFIED to specify operation on Channel 232C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

11. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316(a) of the Communications Act of 1934, as amended, that the license of Station KQMX(FM), Channel 232A, Rolla, Missouri, IS MODIFIED, to specify operation on Channel 292A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in License BMLH-910514KE except for the channel as specified above. Any changes, except those specified require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BMLH-910514KE, except for

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[5] The coordinates for Channel 232C2 at California are 38-26-00 and 92-26-00.

[6] The coordinates for Channel 292A at Rolla are 37-57-50 and 91-45-54. We note that Channel 292A at Station KQMX(FM)'s site is currently short spaced to the allotment site for Channel 291C2, Ashland, Missouri, and the licensed sites for Channel 292A, Station KOZX, Cabool, Missouri, and Channel 295C1, Station KTXY, Jefferson City, Missouri. However, the construction permit for Channel 291C2, Ashland (File No. BPH-880219MD), is fully spaced to the new channel at Rolla. Station KOZX, Channel 292A, Cabool, was ordered to Channel 251A in MM Docket 86-410 and Station KTXY, Channel 295C1, Jefferson City, holds a construction permit for Channel 295C at a site which does not conflict with Channel 292A at Rolla (File No. BMPH-900727IC). Therefore, Channel 292A can be substituted for Channel 232A at Rolla, consistent with the Commission's spacing requirements.

the channel as specified above, and a license application (Form 302) is filed within 10 days of commencement of program tests.

12. IT IS FURTHER ORDERED, That the counterproposal filed by Sobocomo Radio, Inc. (RM-7817) IS DENIED.

13. IT IS FURTHER ORDERED, That the Secretary of the Commission Shall issue a copy of this *Order* by Certified Mail, Return Receipt Requested to

Progressive Broadcasting
Company of Missouri
P.O. Box 728
Rolla, Missouri 65401
(Licensee of Station
KQMX, Rolla, MO)

Sobocomo Radio, Inc.
505 Elm Avenue
Takoma Park, Maryland 20912
(Permittee of Channel 291C2,
Ashland, MO BPH-880219MD)

Central Missouri
Broadcasting, Inc.
420 N.W. Fifth Street
Evansville, Indiana 47708
(Licensee of Station KTXY,
Jefferson City, MO)

KVVC Broadcasting, Inc.
P.O. Box 514
Cabool, Missouri 65689
(Licensee of Station KOZX,
Cabool, MO)

KDAM(FM)
Box 38
The Landing Route J
Monroe City, Missouri 62345

14. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Town & Country Communications, Inc., licensee of Station KZMO-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

15. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

16. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-571

In the Matter of

Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990

ORDER ON RECONSIDERATION, SECOND REPORT AND ORDER, AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: February 19, 1993; Released: February 25, 1993

Comment Date: April 5, 1993
Reply Date: April 19, 1993

By the Commission:

I. INTRODUCTION

1. We have before us five petitions for reconsideration or clarification of policies and rules we recently adopted concerning telecommunications relay services (TRS) for individuals with hearing and speech disabilities, and the Americans with Disabilities Act of 1990 (the ADA).[1] For the reasons set forth below, we reaffirm that: (1) each common carrier providing telephone voice transmission services shall, not later than July 26, 1993, provide TRS throughout the area in which it offers services, either individually, through designees, through a competitively selected vendor, or in concert with other carriers; (2) TRS shall be capable of handling any type of call normally provided by common carriers and the burden of proving the infeasibility of handling any type of call is on the carriers; and (3) with limited exceptions as provided in section 705(a) of the Communications Act and consistent with the obligations of common carrier operators, communications assistants (CAs) are prohibited from disclosing the content of any relayed conversation regardless of content. Finally, we order that interstate TRS costs shall be recovered utilizing a shared-funding mechanism and we propose rules setting forth this cost recovery plan.

II. BACKGROUND

2. In order to fulfill the ADA's mandate that the Commission ensure that interstate and intrastate telecommunications relay services[2] are available, to the extent possible and in the most efficient manner to individuals in the United States with hearing and speech disabilities, this Commission, on November 8, 1990, initiated a rulemaking proceeding.[3] After consideration of the extensive public comments on our TRS proposals and the specific requirements of Title IV of the ADA,[4] we adopted the *TRS Order*. In the *TRS Order,* we fashioned a comprehensive set of rules which set forth terminology and definitions of TRS, prescribe operational, technical, and functional minimum standards required of all TRS providers, and delineate the state certification process.

3. Five petitions for reconsideration or clarification were filed following the release of our *TRS Order*. In response to the petitions, several parties filed comments.[5] The *TRS Order* also requested additional comments on interstate recovery mechanisms, and the Commission has received comments from twenty-seven parties, consisting of seven state government entities, one association representing organizations serving individuals with speech and hearing disabilities, five common carrier associations, and twelve common carriers.[6]

III. DISCUSSION

A. Provision of Services

4. *Petitions and comments.* In its petition, GTE requests that the Commission clarify the extent to which satellite carriers, which do not hold out telephone voice transmission services to the general public, would be affected by or excluded from coverage under the ADA requirements. GTE contends that domestic satellite carriers primarily provide customized interstate private network services to meet the specific needs of their customers and that such services should be considered excluded from the definition of telephone voice transmission services within the scope of the ADA. In support of this contention, GTE argues that satellite carriers do not maintain telephone directory assistance or publish telephone directories because they are not engaged in the business of providing interstate voice services to the general public. Further, GTE asserts that domestic satellite operators do not operate under existing

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[1] *See* Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, Report and Order and Request for Comments, 6 FCC Record 4657 (1991) hereinafter *TRS Order).* The *Request for Comments* portion of this proceeding sought comments on interstate cost recovery mechanisms.

[2] Telecommunications relay services (TRS) allows people with hearing and/or speech disabilities to use the telephone. TRS facilities are equipped with specialized equipment and staffed by communications assistants (CAs) who relay conversation between people who use text telephones and people who use traditional telephones.

[3] *See* Notice of Proposed Rulemaking, CC Docket No. 90-571, 55 Fed. Reg. 50037 (Dec. 4, 1990); 5 FCC Rcd 7187 (1990).

[4] *See* S.933, Pub. L. 101-336, 104 Stat. 327, 366-69 (July 26, 1990).

[5] Appendix A lists the parties filing petitions for reconsideration and reply comments, as well as abbreviations used throughout this Order to refer to those parties.

[6] Appendix B lists the parties commenting on interstate cost recovery, as well as abbreviations used throughout this Order to refer to those parties.

separation rules and therefore the cost recovery method delineated in the *TRS Order* would not be applicable to domestic satellite operators.

5. *Decision.* Section 225(c) of the Communications Act of 1934, as amended (the Act) provides, in pertinent part, that "each common carrier providing voice transmission services shall, not later than 3 years after the date of enactment of this section, provide in compliance with the regulations prescribed under this section, throughout the area in which it offers service, telecommunications relay services, individually, through designees, through a competitively selected vendor, or in concert with other carriers...." Pursuant to section 225(a)(1) of the Act, "the term "common carrier" or "carrier" includes any common carrier engaged in interstate communication by wire or radio as defined in section 3(h) and any common carrier engaged in intrastate communication by wire or radio, notwithstanding sections 2(b) and 221(b)." Section 3(h) of the Act provides that "common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio ...." Under these provisions, all common carriers offering voice transmission services are within the scope of section 225 of the Act.

6. In the *TRS Order,* we concluded that the ADA does require that TRS be provided by all common carriers engaged in voice transmission service by wire or radio.[7] Where satellite services are providing voice transmission services to the general public on a common carrier basis, the space station or its earth station facility is providing telephone voice transmission services as defined in the Act. However, to the extent that satellite service providers are not engaged in providing voice transmission services, these satellite service providers are not within the scope of section 225(c) of the Act, including prescribed cost recovery mechanisms. *See* paragraph 17, *infra.*

B. Coin-Sent Paid Calls

7. *Petitions and Comments.* Ameritech, Bell Atlantic, Bell South, Pacific Bell, SNET, USTA, Sprint, and NYNEX contend that the Commission should exclude coin-sent paid calls (traditional coin service calls) from the mandatory minimum operational TRS standards because TRS is not currently connected to the Automated Coin Telephone System (ACTS) or the Traffic Operator Position System (TOPS), which are used for rating coin-sent paid calls on a "real-time" basis. In support of their contentions, petitioners state that a significant source of the technical difficulty of accommodating coin-sent paid text telephone calls[8] arises because TRS is a relay service that involves two connections: the first from the calling party to the relay center, and the second from the relay center to the called party. Consequently, petitioners aver, TOPS can only rate the first leg of the call because the connection to TOPS terminates once the coin deposit is made, and the TOPS switch is not in place to rate the second leg of service, the actual call to the recipient. Many commenters contend that the TOPS system cannot be configured to stay on the connection because once the Communications Assistant (CA) has obtained the number desired by the calling party, the new destination number would override the original dialed number (the TRS facility). Requests for additional coins cannot be channeled through TRS to the caller because the connection between the caller and TRS is broken when TRS dials the caller's recipient. However, petitioners contend that eliminating the requirement for access to relay services via coin-sent paid calls will only minimally impede the use of coin phones for TRS users because alternate billing systems, such as credit cards, calling cards, collect or third number billing are available to permit TRS access from many coin pay text telephones. With regard to new technologies, Bell Atlantic argues that a large capital investment would be required to equip all pay telephones with visual displays[9] and this would not solve the problems associated with the rating of pay text telephone calls. NYNEX and GTE assert that while coin-sent paid TRS calls are currently infeasible, they are willing to work to find solutions to these technical problems. However, they submit that resolutions of these problems may not occur before the TRS implementation deadline in July, 1993.

8. *Decision.* In the *TRS Order,* we concluded that in order to maintain the functional equivalency standard mandated by the ADA, TRS must be capable of handling any type of call normally provided by common carriers. *See* Section 64.604(a)(3) of the Commission's rules. Specifically, we found no basis for a general exclusion of coin-sent paid calls from the requirements of the ADA and charged the carriers with the burden of proving the infeasibility of handling any particular type of call. After reviewing the record before us, we do not find merit in petitioners' proposal that pay text telephone users be required to use a calling card or other alternative billing method other than coin-sent paid because this proposal would discriminate against persons with disabilities who do not use calling cards or who have not, for example, received permission from the call recipient or third party to reverse the charges. Thus, this proposal does not satisfy the functional equivalency standards mandated by the ADA.

9. With regard to petitioners' contentions regarding the infeasibility of text telephone coin-sent paid calls, we reiterate that technological advances are already beginning to solve many of the feasibility problems raised by petitioners. Recent advances in technology permit relay pay phone consumers to receive visual display messages from operators. Further, the proliferation of portable text telephones (TTs) and deployment of publicly available TTs under the Architectural and Transportation Barrier Compliance

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[7] 6 FCC Rcd at 4660.

[8] Pay text telephone calls are calls made from a coin-operated public telephone using the caller's own portable text telephone or from a coin-operated public telephone with a built-in text telephone such as those presently found in some airports and other public accommodations. *See* generally, Title III of the ADA: Public Accommodations, Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities; Final Guidelines, 36 CFR Part 1191, 56 Fed. Reg. 35408 (July 26, 1991), Amendment to Final Guidelines, 36 CFR Part 1191, 56 Fed. Reg. 45500 (September 6, 1991). These guidelines are provided by the Architectural and Transportation Barriers Compliance Board and explain accessibility requirements for public telephones, text telephones, curb cuts, counters and other public accommodations.

[9] Bell Atlantic states that only a few of its 240,000 coin telephones are equipped with visual display technology and that "to provide this capability, payphone providers would have to retrofit or replace their payphones at a cost of at least tens of millions of dollars for Bell Atlantic alone." Petition at 2.

Board's (ATBCB) recently adopted standards[10] will increase the use of pay text telephones. In their petitions, Bell Atlantic and Ameritech state that processing coin sent-paid calls for TRS customers could be handled by TRS facilities that have special coin-control and rating capabilities and operator services signaling, although the costs associated with developing and implementing this technology are unknown at this time. Merely stating an incompatibility between TRS and ACTS without any analysis of alternative solutions does not meet the heavy burden carriers have to prove infeasibility of providing a service readily available to voice telephone users.

10. The Commission has stated its objective to avoid discouraging the development of improved technology that fosters the availability of telecommunications services to the disabled. *See* Section 64.604(b)(5) of the Commission's rules. To grant reconsideration of the coin-sent paid telephone issue without persuasive evidence of infeasibility would certainly impair and discourage the development of improved technology for pay text telephone services that some carriers seem to be undertaking. We conclude that petitioners have not presented persuasive evidence to justify a general exclusion from providing TRS in conjunction with coin-sent paid telephone calls or cause us to depart from the requirement that TRS be capable of handling any type of call normally provided by common carriers.

C. Audiotext Calls

11. *Petitions and Comments.* In its petition, NYNEX requests that the Commission clarify its rules regarding the obligations of TRS providers when requested to relay user-billed audiotext calls utilizing prompt/response interaction. Specifically, NYNEX proposes that, consistent with section 64.604(a)(2) of the rules, a TRS provider may, upon request to handle a call to an audiotext service, notify the caller that she or he will be responsible for additional charges that may be incurred for each connection required to complete the call to an audiotext service using prompts. NYNEX states that to process an audiotext through each of the prompts, the CA may have to redial the audiotext service several times and the called party may be charged by the audiotext provider for each separate connection. In its comments, BellSouth concurs with NYNEX but notes that the issue is not one of willingness to relay calls to audiotext services but of providing notice to the calling party that additional end user charges may be imposed by the audiotext service provider for each connection. Therefore, BellSouth proposes that the Commission permit the TRS provider to notify the caller to all such user-billed audiotext charges imposed by the audiotext service provider for sequential connections. In its comments, GTE reiterates the arguments it raised in the TRS rulemaking proceeding regarding the issue of whether Congress intended audiotext services to be within the scope of the ADA. GTE contends that user-billed audiotext services are enhanced services specifically excluded in the *TRS Order.*

12. *Decision.* Section 64.604(a)(3) of the rules prohibits CAs from refusing single or sequential calls and requires TRS to be able to handle any type of call normally provided by common carriers. In the *TRS Order,* we stated that the provision of "enhanced" services offered by common carriers is not required under our rules but provision of such services is encouraged if technically feasible. We concur with GTE that "user-billed audiotext" services are "enhanced" services and therefore not required to be provided by TRS pursuant to the ADA. However, we encourage TRS providers to relay user-billed audiotext services and to provide notice to the calling party that additional end user charges may be imposed by the audiotext service provider if sequential connections are necessary to complete prompt/response interactions. We reiterate that non-user-billed audiotext services, recorded messages, remote polling of answering machines, and any other service normally provided by common carriers as basic services are required to be handled by TRS providers.

D. Confidentiality and Liability

13. *Petitions and Comments.* In the *TRS Order,* we stated that, with the limited exceptions related to law enforcement provided in section 705(a) of the Communications Act,[11] CAs would be prohibited from disclosing telephone conversations. We indicated that since there was no clear congressional intent to repeal the limited law enforcement exceptions to nondisclosure in section 705, the exceptions could apply to interstate and foreign relay service conversations.[12] We further stated that any state statutes that conflict with ADA nondisclosure provisions generally would be preempted by the ADA to the extent that they affect relay communications. Specifically, we indicated that state statutes would be preempted by the ADA to the extent that they impose general affirmative disclosure requirements that would not be consistent with section 705 and, therefore, the ADA.[13]

14. Finally, with respect to service and liability issues, we stated that Congress intended relay operators to have the same service obligations as common carriers generally. In this regard, we noted that the common carrier obligation to provide service is not absolute and does not necessarily apply to service for an illegal purpose. We noted, however, that criminal liability for completing an illegal call is imposed only where there is knowing involvement in unlawful use, and that CAs, in the normal performance of their duties, would generally not be deemed to be knowingly involved in such illegal use.[14]

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[10] Architectural and Transportation Barriers Compliance Board, Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities, 56 Fed. Reg. 35,408 (1991).

[11] Section 705(a) of the Communications Act provides, in pertinent part, that "except as authorized by chapter 119, title 18, United States Code, no person' receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpoena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority."

[12] 6 FCC Rcd at 4660.

[13] *Id.* at n.14.

[14] *Id.* at 4660 and nn.15-16.

15. In its petition, NYNEX requests that we amend section 64.604(a)(2) to codify that the section 705(a) exemptions to nondisclosure were incorporated into the ADA and to make clear that state disclosure requirements inconsistent with the ADA are preempted. With respect to the liability issues, NYNEX requests that we amend section 64.604(a)(2) to state that CAs "shall not be deemed" to be knowingly involved in any illegal conversations.[15] USTA, Sprint and GTE support NYNEX's petition. NYNEX proposes language to amend section 64.604(a)(2) to clarify the rule and address its concerns.

16. *Decision.* To the extent that NYNEX and other commenters find section 64.604(a)(2) to be unclear with regard to the confidentiality provided under the ADA, the limited exemptions provided in section 705 of the Communications Act, and the preemption of conflicting state statutes, we shall amend the rule so that it expresses the obligations of CAs set forth in the *TRS Order.* We shall modify NYNEX's proposed language, however, to make it more accurately reflect these obligations. *See* paragraph 18, *infra.*

17. With respect to liability, we continue to believe a CA *generally* would not be deemed to be knowingly involved in illegal use. We will, however, amend the rule to reflect that there is an exception to the requirement to complete all calls where such completion would be inconsistent with federal, state or local law regarding use of telephone company facilities for illegal purposes.

18. Accordingly, we will adopt the following amended language to reflect the CA's confidentiality obligations and limited liability as set forth in the *TRS Order:*

> (2) Confidentiality and conversation content. *Except as authorized by section 705 of the Communications Act, 47 USC § 605,* CAs are prohibited from disclosing the content of any relayed conversation regardless of content and from keeping records of the content of any conversation beyond the duration of a call, even if to do so would be inconsistent with state or local law. CAs are prohibited from intentionally altering a relayed conversation and, *to the extent that it is not inconsistent with federal, state or local law regarding use of telephone company facilities for illegal purposes,* must relay all conversation verbatim unless the relay user specifically requests summarization.[16]

E. Interstate Cost Recovery

19. *Comments.* In their comments, Ameritech, District of Columbia Public Service Commission (DCPSC), Sprint, National Center For Law and Deaf (NCLD), National Telephone Cooperative Association (NTCA), Pacific Bell (PacBell), Southwestern Bell (SW Bell), and Sprint propose a shared-funding mechanism rather than self-funding for interstate TRS cost recovery because they assert that self-funding would encourage disincentives including "splashing,"[17] the reduction of their TRS to marginal levels, and the abandonment of existing toll discounts for TRS consumers. Many commenters that propose a shared-funding mechanism offer as an example the Universal Service Fund and Lifeline Assistance (USF & LA) funding mechanisms which utilize the National Exchange Carriers' Association (NECA) as administrator to bill IXCs having more than .05% of the total presubscribed access lines nationwide. NECA states that approximately 15 to 20 IXCs are billed under this mechanism. In its comments, MCI proposes a specifically identified charge on end users and generally supports a shared-funding approach. Many comments from the states and the hearing and speech disabled community support shared-funding because they support the use of a single 800 number accessed through the certified state TRS program to place both intrastate and interstate TRS calls. In its comments, NECA favors an approach in which TRS providers would be reimbursed by NECA for interstate relay costs on the basis of a fixed amount for each relay call-minute, set annually and based on total projected interstate service demand. NECA asserts that this method would provide carriers with incentives to obtain large volumes of traffic, which they can only do if the price, quality and features of their services are attractive to TRS customers. NECA asserts that it could gather data on interstate relay costs from a sample of relay centers and propose formulas based on those costs. Further, NECA notes that eligibility for reimbursement from the fund would not be related to whether or not the service provider paid into the fund; however, creation of the central fund would provide a mechanism for all interstate carriers to meet their individual obligation to provide TRS. If the Commission adopts this approach, NECA proposes that it will not itself be liable for any shortfalls in revenues, and states that criteria would need to be established for determining eligibility for receiving such settlements.

20. In their comments, Cellular Telecommunications Industry Association (CTIA) and AT&T[18] propose self-funding as the most appropriate interstate cost recovery mechanism because it would capture all interstate services as required pursuant to the ADA and would not incur significant administrative costs. In its comments, AT&T defines self-funding as a mechanism in which each IXC incurs the cost of furnishing interstate TRS. Further, CTIA argues that self-funding will permit IXCs the flexibility to design their own interstate TRS to meet the needs of consumers in the most efficient manner. In their supplementary comments, MCI, NCLD, and Sprint assert that AT&T's self-funding proposal was driven, in part, by AT&T's aversion to using presubscribed lines (PSLs) for assessments in the USF & LA model, and because, except for the top twenty IXCs, all other IXCs, cellular carriers, resellers, and other parties providing interstate services would escape assessment for interstate TRS costs. With regard to commenters' concern about PSL billing, NECA acknowledges that not all interstate carriers or service customers would be billed TRS charges under the USF & LA model. However, NECA asserts that the Commission has specifically found that the current USF billing methodology provides a reasonable way of recovering USF and LA costs notwithstanding that only the largest carriers are

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[15] In the text of its petition, NYNEX requests us to codify our statement that CAs would "generally" not be deemed to knowingly be involved in illegal use, but the "generally" is dropped from its proposed rule amendment.

[16] The underlined language reflects the new language added for clarification.

[17] "Splashing" in this context includes the practice where IXCs try to minimize their TRS costs by encouraging consumers to use other IXCs.

[18] *See* Supplementary Comments of AT&T.

billed. In *Amendment of Part 69 of the Commission's Rules Relating to Assessment of Charges for the Universal Service fund and Lifeline Assistance*, 4 FCC Rcd 6134 (1989), *aff'd mem. ALC Communications Corp. v. FCC* (D.C. Cir. No. 90-1041, February 8, 1991), the Commission stated that the USF method "already captures almost 99% of the nation's presubscribed lines. Moreover, any advantage of raising the number of contributors could be quickly neutralized by the administrative and cost drawbacks of collecting fees from a more volatile population of IXCs."

21. *Decision and proposed rules.* The majority of commenters propose a shared-funding mechanism for interstate TRS cost recovery. These commenters assert that a self-funding mechanism would provide incentives for carriers to handle fewer relay calls, to degrade relay calling quality, to migrate relay customers to other carriers, and to restrict relay to only their presubscribed customers. We agree with these commenters.

22. In order to provide universal telephone service to TRS users as mandated by the ADA, carriers are required to recover interstate TRS costs as part of the cost of interstate telephone services and not as a specifically identified charge on end user's lines. Thus, MCI's proposal to assess such a charge is not feasible. Further, the ADA requires interstate costs to be recovered from all subscribers of every interstate service. Therefore, we reject MCI's proposal and we determine, based on the overall record, that shared-funding will be the best interstate TRS cost recovery mechanism because it spreads the financial liability to all subscribers of every interstate service.[19] Therefore, we find that a shared-funding mechanism shall be utilized for interstate TRS cost recovery and we propose rules for a shared-funding plan as set forth in Appendix D. Based upon the record before us, we further find that existing accounting and separations rules should be adequate to deal with interstate TRS and that a Joint Board proceeding at this time is unnecessary.

23. *Shared-funding proposal.* The proposal we make for shared-funding, while drawing on our experience with various NECA pools, is intended to create strong incentives for TRS providers to offer high quality, innovative service at a reasonable cost. First, under our proposal, TRS providers will report to a fund administrator their interstate revenue requirements for the provision of TRS, as well as interstate TRS minutes of use. The fund administrator would use the data to calculate a national average rate to recover the total interstate TRS revenue requirement. That rate would be used to provide settlements to TRS providers from the fund administrator.

24. We tentatively conclude that this portion of our proposal will create strong incentives for TRS providers to offer high quality, innovative services at reasonable cost. To the extent a TRS provider's costs are high relative to the industry average, this proposal permits payment based only on the average cost. By employing the use of historical data, the plan discourages cost padding. Moreover, by compensating TRS providers based on actual relay minutes, those TRS providers who provide excellent service to the public and thereby generate strong demand, will benefit.

25. One potential problem with this proposal, however, concerns the use of a compensation mechanism based on an average. For example, to the extent a rolling average is used, the mechanism would consistently generate a set of TRS providers who were not fully compensated each year, even if these providers were reasonably efficient. We therefore seek comment on alternative ways to calculate a national average rate, such as freezing the national average rate for some period of time, or other price cap mechanisms that would avoid the problems discussed above. We also seek comment on our tentative decision to require all TRS providers to report cost data and minutes of use data to the fund administrator, as opposed to NECA's suggested alternative of using a sample of TRS providers' costs.

26. With respect to the relationship between the fund administrator and the common carriers who contribute to the fund, we tentatively find that assessments made by the fund administrator should be based on the common carrier's pro rata share of interstate revenues. This proposal will require all interstate common carriers to report interstate revenues to the fund administrator, many of whom have never reported revenues to this Commission. We have tentatively selected this alternative because the other method suggested by commenters, a pro rata measure of presubscribed lines, fails to conform to the requirements of the ADA in that the class of carriers required to pay for relay service is broader than those carriers with presubscribed lines. We seek comment on the feasibility of requiring all common carriers subject to the ADA to report interstate revenues to the fund administrator, and whether the administrator should play a role in enforcing compliance with this rule.

27. Because of its experience in administering the USF and LA programs, we propose that NECA act as administrator of a TRS Fund. Parties may propose specific rules and plans in response to our proposal or propose parties other than NECA to administer the pool, but we emphasize that such plans and proposals must explain why they are superior to the proposal made in Appendix D. They also must provide sufficient specificity to be implemented by July 26, 1993. Regardless of the administrator and plan chosen, we will carefully review all aspects of the administrator's performance after two years of operation to determine whether any changes are appropriate. Comments on our proposed rules as well as other specific plans filed by any interested administrators, shall be filed no later than April 5, 1993. Reply comments shall be filed no later than April 19, 1993. All comments must reference CC Docket No. 90-571.

IV. CONCLUSION

28. For the reasons set forth above, we find that each common carrier providing telephone voice transmission services shall, not later than July 26, 1993, utilizing a shared-funding mechanism for interstate cost recovery, provide throughout the area in which it offers services, TRS, individually, through designees, through a competitively selected vendor, or in concert with other carriers. We

[19] Moreover, we believe that a shared-funding approach can be designed in such a way that the risk sharing aspects of pooling can be de-emphasized to promote innovation and high quality relay services among competitive TRS providers. *See* paragraph 23, *infra*.

further reaffirm that TRS shall be capable of handling any type of call normally provided by common carriers and the burden of proving the infeasibility of handling any type of call will be placed on the carriers, and that consistent with the obligations of common carrier operators, and with limited exceptions as provided in Section 705(a) of the Communications Act, CAs are prohibited from disclosing the content of any relayed conversation regardless of content.

V. PROCEDURAL MATTERS

29. *Final Regulatory Analysis:* Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 601, *et seq.*, the Commission's final analysis in this *Order on Reconsideration, Second Report and Order and Further Notice of Proposed Rulemaking* is as follows:

I. *Need and purpose of this action:*

This *Order on Reconsideration, Second Report and Order and Further Notice of Proposed Rulemaking* further amends the Commission's rules to require that each common carrier engaged in interstate and/or intrastate telephone voice transmission services shall, no later than July 26, 1993, provide telecommunications relay services throughout the area in which it offers service. The rule amendments are required by the Americans with Disabilities Act of 1990, which, *inter alia*, added Section 225 to the Communications Act of 1934, as amended, 47 U.S.C. Section 225. The rules are intended to ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to persons in the United States with speech and/or hearing disabilities.

II. *Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:*

No comments were submitted in direct response to the Regulatory Flexibility Analysis in the *Report and Order a nd Request for Comments* .

III. *Significant alternatives considered:*

The *Report and Order and Request for Comments* in this proceeding offered several proposals and requested comments as well as the views of commenters on other possibilities. The Commission has considered all comments, and has adopted most of its proposals in addition to some alternatives recommended by commenters. The Commission considers its *Order on Reconsideration, Second Report and Order and Further Notice of Proposed Rulemaking* to be the most reasonable course of action under the mandate of Section 225 of the Communications Act, as amended.

IV. *Initial Regulatory Flexibility Act Analysis on the Further Notice of Proposed Rulemaking:*

This is a nonrestricted notice and comment rulemaking proceeding. *Ex Parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203 and 1.1206(a).

We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined in section 601(3) of the Regulatory Flexibility Act. The Secretary shall send a copy of this *Order on Reconsideration, Second Report and Order and Further Notice of Proposed Rulemaking* including the certification to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(A) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before April 5, 1993 and reply comments on or before April 19, 1993. To file formally in this proceeding, interested parties must file an original and four copies of all comments, reply comments, and supporting documents with the reference number "CC Docket 90-571" on each document. If interested parties want each Commissioner to receive a personal copy of comments, interested parties must file an original plus nine copies. Interested parties should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, Federal Communications Commission, 1919 M Street, N.W., Washington, DC. Copies of comments and reply comments are available through the Commission's duplicating contractor: International Transcription Service, Inc. (ITS, Inc), 2100 M Street, N.W., Suite 140, Washington, DC 20037, (202) 857-3800.

VI. ORDERING CLAUSES

30. Accordingly, It is Ordered, That, pursuant to Sections 1, 4(i), 4(j), 201-205, 225 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154(i), 154(j), 201-205, 225 and 403, Part 64 of the Commission's Rules and Regulations IS AMENDED as set forth in Appendix C hereof, effective 60 days after publication in the Federal Register.

31. It is Further Ordered, That, the petitions for reconsideration filed by Ameritech Operating Companies, Bell Atlantic Telephone Companies, Bell South Corporation, GTE Service Corporation, and NYNEX Telephone Companies ARE DENIED IN PART and GRANTED IN PART.

32. It is Further Ordered, That, pursuant to 47 U.S.C. §154(i), notice is hereby given of our intent to adopt the rules proposed in Appendix D.

33. It is Further Ordered, That, pursuant to the requirements of Section 604 of the Regulatory Flexibility Act, 5 U.S.C. 604, the Secretary shall cause a summary of this *Order on Reconsideration, Second Report and Order and Further Notice of Proposed Rulemaking* to be published in the Federal Register which shall include a statement describing how members of the public may obtain such copies. The Secretary shall also provide a copy of this *Order on Reconsideration, Second Report and Order and Further Notice of Proposed Rulemaking* to each state utility commission and to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Petitions for Reconsideration

Petitions

Ameritech Operating Companies (Ameritech)
Bell Atlantic Telephone Companies (Bell Atlantic)
Bell South Corporation (Bell South)
GTE Service Corporation (GTE)
NYNEX Telephone Companies (NYNEX)

Reply comments

Bell South
GTE
Pacific Bell
Southern New England Telephone Company (SNET)
Sprint
United States Telephone Association (USTA)

APPENDIX B

Comments on Interstate Cost Recovery

American Telephone and Telegraph Company *
Ameritech Operating Companies *
Bell Atlantic Telephone Companies *
BellSouth Corporation
California Public Utilities Commission
District of Columbia Public Service Commission
Florida Public Service Commission
GTE Service Corporation
Maryland Public Service Commission
MCI Telecommunications Corporation *
National Exchange Carrier Association *
National Telephone Cooperative Association *
New York Telephone Company and New England Telephone and Telegraph
Pennsylvania Public Utility Commission
Rochester Telephone Corporation
Scott J. Rafferty **
Southwestern Bell **
Sprint *
Telecommunications for the Deaf, Inc.
Vermont Department of Public Service

Reply Comments.

American Telephone and Telegraph Company
Ameritech Operating Companies
BellSouth Corporation
Cellular Telecommunications Industry Association
District of Columbia Public Service Commission
GTE Service Corporation
Maryland Public Service Commission
MCI Telecommunications Corporation
Missouri Public Service Commission
National Association of Regulatory Utility Commissioners
National Center For Law and Deaf, *et. al.* *
National Exchange Carrier Association
National Telephone Cooperative Association
New York Telephone Company and New England Telephone and Telegraph
Pacific Bell *
Rochester Telephone Corporation
Southern New England Telephone Company
Sprint
United States Telephone Association

* Filed Supplementary Comments
** Filed only Supplementary Comments

APPENDIX C

Part 64 of the Commission's Rules and Regulations (chapter 1 of Title 47 of the Code of Federal Regulations, part 64) is amended as follows:

PART 64 - MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation for Part 64 continues to read as follows:

Authority: Section 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 225, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218, 225 unless otherwise noted.

2. Section 64.604(a)(2) and section 64.604(c)(4) are revised as follows:

64.604 Mandatory minimum standards.

(a) Operational standards.

(1) * * *

(2) Confidentiality and conversation content. Except as authorized by section 705 of the Communications Act, 47 USC § 605, CAs are prohibited from disclosing the content of any relayed conversation regardless of content and from keeping records of the content of any conversation beyond the duration of a call, even if to do so would be inconsistent with state or local law. CAs are prohibited from intentionally altering a relayed conversation and, to the extent that it is not inconsistent with federal, state or local law regarding use of telephone company facilities for illegal purposes, must relay all conversation verbatim unless the relay user specifically requests summarization.

(b) * * *

(c) Functional standards.

(1) * * *

(2) * * *

(3) * * *

(4) Jurisdictional separation of costs.

(i) * * *

(ii) Cost recovery. Costs caused by interstate TRS shall be recovered from all subscribers for every interstate service, utilizing a shared-funding cost recovery mechanism. Costs caused by intrastate TRS shall be recovered from the intrastate jurisdiction. In a state that has a certified program under section 64.605, the state agency providing TRS shall, through the state's regulatory agency, permit a common carrier to recover costs incurred in providing TRS by a method consistent with the requirements of this section.

* * * * *

APPENDIX D

Proposed Rules

Part 64 of the Commission's Rules and Regulations (chapter 1 of Title 47 of the Code of Federal Regulations, part 64) is proposed to be amended as follows:

PART 64 - MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation for Part 64 continues to read as follows:

Authority: Section 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 225, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218, 225 unless otherwise noted.

2. Section 64.604(c)(4) is proposed to be amended to read as follows:

(c) Functional standards.

(1) * * *

(2) * * *

(3) * * *

(4) Jurisdictional separation of costs.

(i) General. Where appropriate, costs elements for the provision of TRS shall be categorized and separated between jurisdictions on a basis consistent with Part 36 of the Commission's rules and in accordance with the jurisdictional separa-

tion procedures and standards pursuant to section 410 of the Communications Act of 1934, as amended.

(ii) Cost recovery. Costs caused by interstate TRS shall be recovered from all subscribers for every interstate service, utilizing a shared-funding cost recovery mechanism. Costs caused by intrastate TRS shall be recovered from the intrastate jurisdiction.

(iii) Telecommunications Relay Services Fund. Effective July 26, 1993, an Interstate Cost Recovery Plan, hereinafter referred to as the TRS Fund, shall be administered by the National Exchange Carriers Association (association).

(a) Assessments. A charge that is expressed in dollars and cents shall be assessed upon all common carriers that offer interstate telecommunications services on the basis of their relative share of nationwide interstate revenues for common carrier services.

(b) Carrier assessment computations. The charge shall be computed by the association on a semi-annual basis by dividing one-twelfth of the projected annual TRS Fund revenue requirement by the total proportionate share of each carrier's interstate revenues. Beginning on August 1, 1993, the association shall bill and collect the charge on a monthly basis. The formulations shall be designed to compensate TRS providers for reasonable costs of providing interstate TRS. The association shall file schedules of charges and settlement formulations by June 1, 1993 to be effective July 26, 1993.

(c) Data collection. TRS providers shall provide the association the true and adequate data necessary to compute charges, revenue requirements and settlements. True and adequate data shall include interstate message revenue, total interstate switched traffic minutes of use, total TRS minutes of use, total interstate TRS minutes of use, TRS operating expenses, TRS interstate investment, and other information necessary for the association to compute the charge and settlements. Information required to be provided to the association shall be filed with the association on June 30 and December 30 of each year, except for the first such submission, containing data calculated as of December 31, 1992, which shall be filed on May 1, 1993. Data filed on June 30 shall be calculated as of December 31 of the preceding year, and data filed on December 30 shall be calculated as of June 30 of the same year. The association shall have the authority to examine, verify and audit billing data received from TRS providers as necessary.

(d) The TRS Fund will be subject to a yearly audit.

(e) Settlements. TRS Fund settlements shall be distributed to TRS providers based on total interstate TRS minutes of use. TRS minutes of use for purposes of interstate cost recovery under the TRS Fund is defined as the minutes of use for completed calls beginning after call set-up and concluding after the last message call unit. All TRS providers including providers who are not interexchange carriers, local exchange carriers, or certified state relay providers, must submit reports of interstate TRS minutes of use to the association in order to receive settlements. TRS providers receiving settlements shall be subject to Parts 32 and 36 of the Commission's rules for purposes of the TRS fund plan. The association shall establish procedures to verify settlement claims, and may suspend or delay payments to TRS providers if directed by the Commission to do so.

(f) TRS providers eligible for receiving settlements from the TRS Fund are:

(1) state certified TRS programs operating pursuant to Section 64.605; orp

(2) TRS facilities owned by or operated under contract with a common carrier providing interstate services; orp

(3) interstate common carriers.

(g) Any eligible TRS provider as defined in section (f) of this section shall notify the association of its intent to participate in the TRS interstate cost recovery plan sixty (60) days prior to submitting reports of TRS interstate minutes of use in order to receive settlements for interstate TRS services.

(h) Association reporting and filing requirements. The association shall perform all filing and reporting functions required under section 69.603 and shall conform TRS Fund reports and filings to meet the reporting and filing specifications for the Universal Service Fund.

(i) The association's performance and this plan shall be reviewed by the Commission after two years to determine whether any changes are necessary.

* * *

Part 69 of the Commission's Rules and Regulations (chapter 1 of Title 47 of the Code of Federal Regulations, part 69) is proposed to be amended as follows:

PART 69 - ACCESS CHARGES

1. The authority citation for Part 69 is not modified.

2. Section 69.613 is proposed to be added to read as follows:

The association shall administer the Telecommunications Relay Services Fund (TRS Fund), including the direct billing to and collection of associated revenues on a monthly basis, or other basis pursuant to section 64.604(c)(4)(iii)(a), and the distribution of these revenues to eligible TRS providers pursuant to section 64.604(c)(4)(iii)(f).

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 91-280

In the Matter of

Amendment of Section 2.106 of	
the Commission's Rules to	RM-7334 PP-1
Allocate Spectrum to the Fixed-	RM-7399 PP-2
Satellite Service and the	RM-7612 PP-3
Mobile-Satellite Service for	
Low-Earth Orbit Satellites	

REPORT AND ORDER

Adopted: January 14, 1993; Released: February 5, 1993

By the Commission:

1. In this *Report and Order* we allocate approximately 4 MHz of spectrum from the VHF/UHF bands for use by low-Earth orbit satellites operating in the mobile-satellite service (LEO-MSS)[1] and awarda pioneer's preference to Volunteers in Technical Assistance (VITA).[2] Specifically, in this *Report and Order* we take the following actions:

Allocate the 137-137.025, 137.175-137.825, and 400.15-401 MHz bands on a primary basis for LEO-MSS (space-to-Earth);

Allocate the 137.025-137.175 and 137.825-138 MHz bands on a secondary basis for LEO-MSS (space-to-Earth); Allocate the 148-150.05 and 399.9-400.05 MHz bands on a primary basis for LEO-MSS (Earth-to-space);

Adopt specific conditions for use of these bands for LEO-MSS intended to avoid interference with existing users; and

Award a pioneer's preference to VITA.

BACKGROUND

2. LEO satellites are non-geostationary satellites that generally orbit the Earth at altitudes of approximately 1000 to 2000 km (650-1300 miles).[3] Several parties have proposed using LEO systems at VHF/UHF frequencies to provide commercial and non-commercial non-voice, non-geostationary satellite services, including data messaging and position determination.[4] These proponents state that lightweight and inexpensive portable transceiver units can be developed to operate with low-cost LEO satellites.

3. In response to these requests, we proposed to allocate spectrum in the VHF/UHF bands for low-Earth orbiting satellite systems.[5] Specifically, in our *Notice*, we proposed to allocate spectrum to LEO-MSS in the 137-138, 148-150.05, 399.9-400.05, and 400.15-401 MHz bands.[6] This proposal included all of the spectrum proposed by the petitioners (with the exception of a 401-403 MHz alternative proposed by ORBCOMM), as well as the 149.9-150.05 and 399.9-400.05 MHz bands used currently for the TRANSIT-SAT Radionavigation Satellite System (TRANSIT-SAT) that is expected to cease operation by January 1, 1997. We noted that this proposal would accommodate the spectrum requests of all three proponents and allow for future growth. We recognized that coordination would be necessary between the three proposed LEO systems due to their different access methods (CDMA spread spectrum and FDMA) and invited comment on sharing, access methods and the amount of spectrum needed to provide the envisioned services.

4. In our *Notice*, we also tentatively proposed to award a pioneer's preference to VITA for its pioneering work in developing LEO concepts and technology. We found that VITA was the first to experiment with LEOs for a civilian communications system. We further tentatively concluded that the requests for a pioneer's preference filed by ORBCOMM and STARSYS should not be granted because their

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[1] A total of 1.85 MHz is provided for space-to-Earth (downlink) operations and 2.2 MHz is provided for Earth-to-space (uplink) operations.

[2] *See Notice of Proposed Rule Making* (*Notice*), ET Docket No. 91-280, 6 FCC Rcd 5932 (1991) and *Tentative Decision*, ET Docket No. 91-280, 7 FCC 1625 (1992).

[3] A geostationary satellite's circular and direct orbit lies in the plane of the Earth's equator and remains fixed relative to the Earth. The distance to the Earth is approximately 35,785 km (22,235 miles).

[4] Orbital Communications Corporation (ORBCOMM), STARSYS Inc. (STARSYS), and Volunteers in Technical Assistance (VITA) filed petitions for rule making requesting amendment of the Commission's rules to establish a data service using LEOs. ORBCOMM requests that 370 kHz in the 137-138 MHz band and 478 kHz in the 148-149.9 MHz band be allocated for LEO-MSS and that the 400.15-403 MHz band be considered as an alternative. ORBCOMM proposes a commercial system that would consist of 20 spacecraft placed in low-Earth orbit at about 1,300 kilometers above the Earth. ORBCOMM proposes to provide MSS services using frequency division multiple access (FDMA). STARSYS made a similar spectrum request for a commercial system that would consist of 24 small satellites. STARSYS proposes to provide service using code division multiple access (CDMA) spread spectrum in the 137-138 and 148-149 MHz bands. VITA proposes to construct two satellites and one ground spare. VITA's proposed service would use between 190 and 210 kHz in the 137-138, 148-149.9, and 400.15-401 MHz bands for a non-commercial low-Earth orbit satellite service to communicate between fixed locations using FDMA. The VITA LEO satellite system would be used on a humanitarian aid-related basis to provide a communications system for educational, health, environmental, disaster relief, and other services intended to benefit recipients in developing countries.

[5] *See Notice*, *supra*.

[6] Currently, the 137-138 MHz band is allocated to the space operation service (space-to-Earth), meteorological-satellite service (space-to-Earth), and space research service (space-to-Earth). The 148-149.9 MHz band is allocated to the fixed and mobile services. The 400.15-401 MHz band is allocated to the meteorological satellite service, space research service, and meteorological aids service.

work did not satisfy our pioneer's preference criteria for innovativeness and was significantly preceded by the pioneering work of VITA.

5. Subsequent to our *Notice*, the 1992 World Administrative Radio Conference (WARC-92) allocated spectrum to the mobile-satellite service in the 137-138, 148-150.05,[7] and 400.15-401 MHz bands.[8] WARC-92 adopted advance publication, coordination and notification requirements between satellite systems in these bands and additional coordination requirements with terrestrial services. To protect the existing terrestrial services in the frequency bands designated for transmission in the space-to-Earth direction, WARC-92 also adopted footnotes which stipulate that coordination is required if satellite power flux-density limits are above certain pre-established values.[9]

6. In a related activity, we also established an advisory committee that permitted LEO satellite system proponents to negotiate regulations defining the technical rules appropriate to the provision of LEO data messaging and position determination services.[10] On September 16, 1992 the Committee released a report summarizing its findings and recommending rules for the implementation of LEO services below 1 GHz.[11] We will consider these recommendations in a companion Notice of Proposed Rule Making adopted today in CC Docket No. 92-76.

DISCUSSION

7. Based on the record, we find that sufficient demand exists to warrant allocation of VHF/UHF spectrum for a low-Earth orbit satellite service. We believe that LEO satellite systems should be capable of providing services at substantial cost savings compared with other existing satellite data systems. These savings are possible due to the low power requirements of both the earth and space equipment and due to advances in launch vehicle technology that have made the launch of such LEO systems more cost-effective. Accordingly, we believe that there is sufficient demand for low-cost data messaging and position determination to warrant a separate allocation for LEO-MSS in the VHF/UHF bands.

8. Further, we affirm our tentative decision to award a pioneer's preference to VITA. VITA was the first to develop, construct, and operate a civilian low-Earth orbit satellite communications system on an experimental basis. ORBCOMM and STARSYS have not provided additional facts to dispute that VITA was the first to demonstrate an operational system and associated LEO satellite technology. Thus, we are awarding VITA a pioneer's preference for a LEO service below 1 GHz. The following is a discussion of the pertinent issues raised in the NPRM and subsequent comments.

Need for LEOs

9. We conclude that LEOs offer an affordable means to meet a growing demand for low-cost mobile communications services. Due to the low power requirements of LEO space stations and their associated portable transceivers, we believe that LEOs will offer a variety of services and features at low cost. The comments demonstrate that demand exists for low cost data and radiolocation services and that LEOs offer a viable approach for providing these services. For example, the American Petroleum Institute (API) states that LEO satellites potentially are more versatile than the very small aperture terminals (VSATs) that now are used for controlling pipeline valves and also contends that LEOs will provide a low-cost alternative for monitoring very remote industrial complexes and other facilities located in environmentally sensitive areas where terrestrial telephone service is not available or practical. API also states that LEOs will prove beneficial in responding to industry emergencies.

10. Comments from the Intelligent Vehicle Highway Systems (IVHS) Advisory Committee established by the Department of Transportation also support our proposed allocation for LEOs. IVHS states that LEO technology is one of several new technologies that show promise for the future implementation of systems that communicate with vehicles to convey traffic, road conditions, and other information to travelers.

11. ORBCOMM maintains that LEO satellites also can serve the needs of rural customers by providing emergency services, data acquisition, tracking and two-way messaging to parts of the country that currently do not enjoy these services. STARSYS contends that a huge market potential exists for the automotive industry for theft control and for smaller markets including boating, construction, and roadside assistance. STARSYS estimates the U.S. market, for the uses already identified, to be at least 10 million subscribers. STARSYS states that its estimate of demand is based on the use of low-cost subscriber equipment and projected low service charges that are predicted for services provided by LEOs.

Spectrum Allocation

12. As discussed below, we are allocating the 137-138, 148-150.05, 399.9-400.05, and 400.15-401 MHz bands for LEO-MSS and are adopting regulatory procedures to ensure that the use of these frequencies does not cause harmful interference to existing users. We note that LEO applicants have designed their systems to co-exist with government operations in these bands. ORBCOMM proposes to use dynamic scanning[12] to search for vacant channels and thereby avoid interfering with government communications. STARSYS intends to avoid interference by using spread spectrum techniques and operate in the 137-138 and

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[7] The World Administrative Radio Conference - 1992 (WARC-92) was held in Malaga-Torremolinos, Spain, in February/March 1992. *See Final Acts of the World Administrative Radio Conference, Malaga-Torremolinos, 1992* (WARC-92Final Acts). The WARC allocation at 149.9-150.05 MHz was for a land mobile-satellite service. To be consistent with other domestic allocations and allow for flexibility, we designate this allocation as mobile-satellite service.

[8] *Supra.*

[9] *See* WARC 92 Final Acts, *supra.*

[10] This committee was created under the Federal Advisory Committee Act, 5 U.S.C. App. 1 (1988) and the Negotiated Rulemaking Act of 1990, Pub. L. 101-648, 104 Stat. 4969.

[11] *See Report of the Below 1 GHz LEO Negotiated Rulemaking Committee*, CC Docket No. 92-76 (released September 16, 1992).

[12] ORBCOMM calls its method of channel scanning "Dynamic Channel Activity Assignment System" (DCAAS).

148-149 MHz bands on a non-interference basis.[13] VITA has engineered its proposal to use a very limited amount of spectrum (about 200 kHz) so that it can co-exist with the other LEO satellite providers and existing government users without causing harmful interference. In general, the allocations and procedures we are adopting for LEO-MSS are consistent with those proposed in the *Notice*, the results of the WARC-92, and the recommendations of our Below 1 GHz LEO negotiated rulemaking advisory committee. In some instances we have modified our initial proposals to more fully meet the needs of the LEO proponents and ensure protection to existing users. The specific requirements for each of the allocations are discussed below.

13. *137-138 MHz.* LEO proponents will share the 137-138 MHz band primarily by avoiding those frequencies used by meteorological-satellite operations and other government users. The negotiated rulemaking advisory committee[14] studied the issue of spectrum sharing. Subsequent to the efforts of the advisory committee ORBCOMM, STARSYS, and VITA submitted a plan on how they could share the band on a non-interfering basis.[15] We agree with the conclusions of the Negotiated Rulemaking Committee that it is not necessary to prescribe a particular access method because licensees in the 137-138 MHz band will be able to coordinate their respective systems whether they use FDMA or CDMA spread spectrum techniques.[16] We believe that the three petitioner can be accommodated in the band and that additional licensees may be accommodated in the future.

14. To assure that existing government users in the 137-138 MHz band are afforded full protection, we also are adopting the WARC-92 conditions and the limitations proposed in our *Notice*. These provide that use of the 137-138 MHz band will be secondary to government satellite operations, until January 1, 2000, in the following frequency ranges: 137.333-137.367 MHz, 137.485-137.515 MHz, 137.605-137.635 MHz, and 137.753-137.787 MHz. WARC-92 allocated spectrum for LEOs in the 137-138 MHz band in the following manner: 1) the 137-137.025 and 137.175-137.825 MHz bands are allocated to the mobile-satellite service on a primary basis and 2) the 137.025-137.175 and 137.825-138 MHz bands are allocated to the mobile-satellite service on a secondary basis. The use of these bands for MSS was limited by WARC-92 to non-geostationary satellite systems. Further, use of the 137-138 MHz band by MSS is subject to the coordination and notification procedures set forth in Resolution 46 of the 1992 WARC (RES46 (WARC-92)).[17]

15. *148-149.9 MHz.* The 148-149.9 MHz band is shared by government and non-government operations. It currently is used by government fixed and mobile operations. The ORBCOMM system plans to avoid active government channels through its dynamic channel scanning technique. STARSYS plans to use spread spectrum CDMA to avoid interference with governmental terrestrial users. Finally, VITA has designed its planned spectrum usage to permit co-existence with ORBCOMM and STARSYS and to have no noticeable impact on the terrestrial operations in this band.

16. In the *Notice*, we proposed adopting five conditions for LEO use to protect existing government users in this band from interference. These conditions were proposed in the *Notice* with regard to the 148-149.9 MHz band only and are as follows:

> (1) LEO operations shall not constrain operation of the fixed and mobile services;
>
> (2) LEOs shall be designed to accept all signals into the satellite from the fixed and mobile systems;
>
> (3) to preclude interference to terrestrial stations operating in accordance with the Frequency Allocations Table, the LEO earth stations shall avoid channels being used by the fixed and mobile services, or limit their spectral power density;
>
> (4) the individual transmissions will be short bursts of 150 milliseconds or less and have a low duty cycle; and
>
> (5) the LEOs shall be limited to non-voice services.

ORBCOMM, STARSYS, and VITA argue that these conditions are too restrictive. Generally, their concern is whether conditions (1) and (2) require them to protect only existing government fixed and mobile operations, or whether MSS operations will be secondary to government users and expected to accommodate all new fixed and mobile government users and all modifications to current operations.[18] ORBCOMM and STARSYS also object to having their transmissions limited to specific duty cycles in the band.

17. We agree that the conditions included in the *Notice* are too restrictive, and have modified them as discussed below. However, we expect the LEO licensees to fully coordinate their systems with the government operators and to comply with the international coordination requirements. LEO satellite users will need to protect government fixed and mobile users. We are adopting a new US footnote US325 in the Table of Frequency Allocations which states that stations in the mobile and fixed service authorized after January 1, 1994 are not protected from land earth stations in the MSS operating on a primary basis. Further,

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[13] In its comments STARSYS suggests that the 138-142 MHz band could be used as an alternative band by LEO satellite systems. However, this band was not part of our proposal nor was it proposed initially by any of the proponents. We believe sufficient spectrum is being allocated for LEO-MSS, and therefore decline to consider allocating the 138-142 MHz band for LEO-MSS.

[14] *See Report of the Below 1 GHz LEO Negotiated Rulemaking Committee, supra.*

[15] *See Jointly Filed Supplemental Comments,* submitted by ORBCOMM, STARSYS, and VITA in CC Docket No. 92-76 on October 16, 1992.

[16] *See Report of the Below 1 GHz LEO Negotiated Rulemaking Committee, supra.*

[17] RR599A (WARC-92) states that the use of the 137-138 MHz band by the mobile-satellite service is subject to the application of the coordination and notification procedures for space stations set forth in Resolution 46 (WARC-92). Pursuant to this regulation, coordination of a space station of the mobile-satellite service with respect to terrestrial services is required only if the power flux-density produced by the station exceeds -125 dB(W/m^2/4kHz) at the Earth's surface. The Final Acts require that the power flux-density threshold apply until a competent world administrative radio conference revises it.

[18] *See* ORBCOMM comments at 26, STARSYS at 14-15, and VITA at 15-17.

after discussions with the National Telecommunications and Information Administration (NTIA) we conclude that government stations in the fixed and mobile services that increase their radiated power to levels that exceed 27 dBW effective isotropic radiated power (EIRP) or that change to an emission bandwidth wider than 38 kHz will be considered new facilities and will be required to coordinate with MSS space stations.[19]

18. Although we are limiting duty cycles in the 148-149.9 MHz band, we have modified our proposal to reflect more fully the needs of the LEO proponents and yet provide protection to existing fixed and mobile terrestrial users. We believe that the modifications we are making to proposed footnote US323 that addresses the conditions for sharing the 148-149.9 MHz band will more readily accommodate the concerns raised by the LEO proponents as reflected in the record and yet also will afford a measure of protection to the government users.[20] These changes in the sharing criteria will accommodate future growth for both the MSS and the government terrestrial services.

19. Expansion by MSS and terrestrial fixed and mobile services will depend on a coordination process that balances the needs of both services. For FDMA systems, we are increasing the transmission burst length requirement from 150 ms to 450 ms, but limiting the total transmission time from each mobile earth station to no more than 1 percent of any 15 minute period. This translates, for example, to no more than 20 bursts of 450 ms during any 15 minute period. For CDMA systems, we are limiting the transmissions from each mobile station to 0.25 percent of any 15 minute period (*e.g.*, five bursts of 450 ms). Additionally, CDMA transmissions that do not avoid frequencies actively being used by the fixed and mobile services shall not exceed an EIRP power density of -16 dBW/4kHz. In both FDMA and the CDMA systems consecutive transmissions on the same frequency from each mobile shall be separated by at least 15 seconds.

20. On October 16, 1992, ORBCOMM, STARSYS, and VITA filed joint supplemental comments requesting that the Commission not prescribe a duty cycle requirement for LEOs in the 148-149.9 MHz band. The parties indicated that a duty cycle requirement is unnecessary because they will coordinate with the government fixed and mobile users and satisfy any interference concerns through this process. We do not believe that it is practical for MSS mobile transmitters to be coordinated with users on a case-by-case basis. Establishing power and duty cycle criteria of US325 permits sharing between MSS and terrestrial systems without the need for coordinating all MSS use. Further, we believe establishing a baseline for sharing is preferable to an approach whereby each prospective MSS applicant has to negotiate individually with terrestrial users. Moreover, the duty cycle requirements we are adopting are more generous to LEO applicants than those we originally proposed and those originally proposed by the applicants themselves. The duty cycle limits were negotiated with NTIA and are designed to protect terrestrial government users. These limits also form the basis for frequency coordination between MSS mobile earth stations and fixed and mobile operations.

21. The limited duty cycles that we are adopting significantly reduce the likelihood that a LEO satellite system will interfere with the terrestrial service in the band. Further, we understand that ORBCOMM will use a dynamic channel scanning and assignment scheme that will search for vacant channels that can be used for short transmissions of data bursts. We believe that a limited duty cycle of 1 percent will not result in undesirable interruption or interference to government terrestrial operations in this band or seriously affect the ability of the fixed and mobile users to make modifications to their systems. For CDMA, the power levels are very small (less than 1 watt) compared to the power levels of terrestrial fixed and mobile users (120 watts transmitter power on the average). In this case a duty cycle of 0.25 percent should ensure that no harmful interference is caused to fixed and mobile users. Additionally, because of the difference in bit rates in the ORBCOMM and STARSYS systems, the duty cycle that we are adopting for CDMA systems has an information throughput equivalent to that obtainable using the duty cycle we are adopting for FDMA systems. We believe this duty cycle is sufficiently short to reduce any random interruptions to terrestrial operations that might result from use of CDMA systems. Thus, we conclude that a CDMA system is compatible with fixed and mobile operations in this band. We note further that STARSYS is using CDMA for experiments. If future experiments indicate that our conclusions on the compatibility of LEO-MSS (CDMA) and fixed and mobile terrestrial operations are overly optimistic we will consider additional conditions and/or restrictions on the duty cycles.

22. WARC-92 subjected spectrum for LEOs in the 148-149.9 MHz band to the advanced publication, coordination, and notification procedures set forth in RES46 (WARC-92). For our domestic LEO-MSS service to be in conformance with WARC-92, the LEO systems shall not constrain the development and use of fixed, mobile and space operation services.[21] Further, RR608A and RR608B (WARC-92) provide that mobile earth stations in the mobile-satellite service shall not produce a power flux-density in excess of -150 dB(W/m^2/4kHz) outside national boundaries. To ensure consistency with WARC-92, we are modifying the Table of Frequency Allocations to include the applicable international footnotes with the U.S. allocation for LEO-MSS in the United States.[22] Earth stations with a

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[19] Additionally NTIA and other Federal agencies have agreed that they will not introduce new narrowband technologies (e.g. 12.5 kHz channel spacing or less) in the 148-149.9 MHz band unless first coordinated with the Commission. This agreement was reached during recent discussions of the Interdepartment Radio Advisory Committee (IRAC).

[20] This footnote was designated US320 in the *Notice*. *See* Appendix A for the text of the new US footnotes to the Table of Frequency Allocations, 47 C.F.R. Section 2.106 (1991) that we are adopting. These footnotes have been re-numbered from those in the *Notice*. Footnote US319 limits government stations in the MSS to earth stations operating with non-government satellite systems authorized by the Commission. We also have added new footnotes US323, US324, and US325. The new US325 denotes the specific conditions for coordination between the MSS and the terrestrial fixed and mobile users in the 148-149.9 MHz band discussed in para. 17, *supra*.

[21] *See* footnote 608A in Appendix A.

[22] *See* Appendix A. We reference new international footnotes 599A, 599B, 608A, 608B, 647A, and 647B in Section 2.106 to be consistent with WARC-92 and the recommendations of the Negotiated Rulemaking Committee Report. *See Report of the Below 1 GHz LEO Negotiated Rulemaking, supra*.

power flux density in excess of -150 dB ($W/m^2/4kHz$) will require international coordination of LEO satellite services with terrestrial services in neighboring countries. If licensees are not able to negotiate a relaxation of this requirement through the ITU coordination process they will be expected to meet this power flux density limit. However, we will accept applications with mobile earth station characteristics which exceed -150dB ($W/m^2/4kHz$) with the understanding that its operation within the geographic areas near the U.S.-Canadian and U.S.-Mexican borders will require coordination with our neighboring countries. The operation of these mobile earth stations must be consistent with these coordination results and may require restrictions or licensing conditions consistent with these power flux density levels. Finally, we are adopting other recommendations of the parties relating to the frequency allocation that track the recent findings of the Advisory Committee established in the Below 1 GHz LEO Negotiated Rulemaking.[23]

23. *400.15-401 MHz.* Comments favor use of the 400.15-401 MHz band for implementation of LEO satellite systems. VITA urges the Commission to allocate this band for the LEO satellite service, stating that its satellite proposal is compatible with existing users of this band. STARSYS indicates that it would be interested in using this band although this band was not part of its original proposal. STARSYS contends that where co-channel satellite operations are not possible, small frequency offsets can be used to facilitate coordination of LEO-MSS operations with other existing primary services without causing unacceptable or harmful interference. Based on the record, we conclude that the reallocation of the 400.15-401 MHz band to LEO-MSS would be in the public interest and therefore will allocate the band for this purpose. We had proposed to authorize by-directional use of this band but do not do so because such use is not contemplated by any proponents.

24. *149.9-150.05 and 399.9-400.05 MHz Bands.* In the *Notice* we also proposed to allocate the TRANSIT-SAT bands for LEO-MSS operation after the TRANSIT-SAT system ceases operation (tentatively scheduled for January 1, 1997). Based on the comments, we believe these bands are suitable for LEO-MSS and that allocating this additional spectrum will help ensure that a viable LEO service is realized, and therefore will allocate them for this purpose. For example, STARSYS points out that the allocation of this additional spectrum will allow multiple LEO systems to operate without causing interference to other systems or to each other. We therefore are allocating these bands to LEOs on a primary basis conditioned upon the discontinuance of the TRANSIT-SAT radionavigation system. Until the TRANSIT-SAT system is discontinued, we also will permit the 149.9-150.05 MHz band to be used for MSS "gateways" (connections with other communications systems such as the Public Switched Telephone Network) on a secondary basis. We had proposed to authorized by-directional use of the 399.9-400.05 MHz band, but do not do so inasmuch as such use is not contemplated by any proponent.

Need for Separate Non-commercial Allocation

25. In the *Notice,* we requested comment on whether we should establish a non-commercial LEO service as sought by VITA. In this regard, we requested comment on whether a commercial LEO licensee is likely to offer LEO services to non-profit organizations at lower cost than a non-commercial LEO licensee independently could develop and operate its own system. ORBCOMM supports the VITA request for a separate non-commercial service, stating that VITA's different operating requirements cannot be readily accommodated by its system. ORBCOMM states that it plans to transmit short data bursts between millions of potential customers, whereas VITA intends to transmit much larger data streams between only a relatively few users, and therefore that VITA should be provided for separately.[24]

26. STARSYS, on the other hand, argues that the non-commercial service proposed by VITA can be accommodated within the framework of its commercial LEO service and that a dedicated non-commercial service therefore is not needed. Instead, STARSYS argues that the non-commercial needs be addressed in a separate proceeding that deals with service rules. We conclude that a separate allocation for non-commercial service is unwarranted because under the allocation scheme that we are adopting VITA, if ultimately licensed, will be permitted to provide its non-commercial services.[25]

Need for a Separate Fixed Satellite Service

27. VITA in its original petition requested that the spectrum allocation for LEOs include fixed-satellite service. Although we originally proposed both fixed and mobile-satellite services for these bands, we are finalizing the allocation as MSS to be consistent with the results of the WARC-92. We note that this MSS allocation includes a footnote that permits links between land earth stations at fixed locations in specified bands. This will permit authorization of the services proposed by VITA. *See* footnote US320 in appendix A.

Access Technologies

28. In the *Notice,* we stated that we intended to provide for multiple operators of LEO systems. At that time we also invited comment on whether we should specify an access method (FDMA versus CDMA spread spectrum). We recognize that the access method implemented, CDMA spread spectrum or frequency division multiple access (FDMA), will directly affect the technical feasibility of competitive systems to co-exist within the same spectrum allocation and with the existing users in the shared bands. Our objective is to accommodate the three proponents that have applied for a spectrum allocation for LEOs and possibly a second generation of licensees. However, we stated in the *Notice* that we did not have the necessary information to pick one scheme over the other and sought comment on this issue.

29. ORBCOMM asserts that its proposed LEO satellite service can co-exist with current users in the proposed bands through use of its Dynamic Channel Activity Assignment System (DCAAS) and FDMA. ORBCOMM indicates

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[23] *See Report of the Below 1 GHz LEO Negotiated Rulemaking Committee, supra.*

[24] *See* ORBCOMM comments at 22.

[25] *See* footnote US320 in Appendix A.

that its DCAAS system would search every ten seconds for the least active channel in the subject bands and then transmit its data for short duration. It contends that these facets of its system will minimize unacceptable interference to existing users and maximize efficient use of the spectrum by actively seeking out and using quiet channels on a dynamic basis.[26]

30. STARSYS requests that the Commission require CDMA in all LEO satellite systems. It maintains that CDMA spread spectrum is better suited for sharing than FDMA because: 1) LEO FDMA use will interfere with terrestrial FDMA pager operations along the Canadian border in the 148-149.9 MHz band; 2) multiple entry is facilitated by CDMA; and 3) CDMA can operate without interfering with existing or competitive U.S. users.

31. LEOSAT agrees with STARSYS that CDMA offers advantages over FDMA for accommodating the most licensees. From its analysis, LEOSAT concludes that CDMA can support 5 to 10 times the communications traffic of FDMA. LEOSAT also submits a study performed by a Canadian entity that compares the pros and cons of each access method (CDMA and FDMA).[27] The study recommends using bands other than the 148-149.9 MHz band. Alternatively, the study states that the band could be utilized if CDMA were employed.

32. From the record and the report of the Negotiated Rulemaking proceeding we are optimistic that both the CDMA approach advocated by STARSYS and the FDMA approach of ORBCOMM can be accommodated in the spectrum that we are allocating. The advisory committee associated with the Negotiated Rulemaking proceeding decided to leave the issue of access method to the licensees rather than recommend a particular access method.[28] We agree that selection of access method should be made by the commercial MSS licensees. We believe that this will foster competition and permit the commercial MSS licensees flexibility in coordinating their respective systems with the terrestrial community.

PIONEER'S PREFERENCE

33. The Commission's pioneer's preference rules provide preferential treatment in its licensing processes to parties that develop new communications services and technologies. This fosters the development of new services and improvements to existing services by reducing for innovators the delays and risks associated with the Commission's licensing procedure. True innovators of substantial new communications services and technologies have an opportunity to participate either in the new services that they took a lead in developing or in existing services with regard to which they took a lead in promoting application of new technologies.[29]

34. To be granted a pioneer's preference, an applicant must demonstrate to us its responsibility for one or more significant innovations that relate to communications technology or service, and significant effort in developing the innovation and pursuing authorization of its implementation. We do not grant pioneer's preference requests casually, but rather, require that each requester persuade us that its proposal is innovative, has merit, and that the requester is the original developer and proponent of the innovation at issue.[30]

35. In the *Tentative Decision*, we made an initial determination to grant VITA a pioneer's preference for a license to operate a low-Earth orbit satellite system to provide data communications. We tentatively found that VITA was the first to develop and demonstrate the utility of a small LEO system using VHF frequencies for civilian communications purposes. Specifically, we noted that VITA, with the Radio Amateur Satellite Corporation, designed and constructed a satellite packet radio package incorporating prototype technology that was launched in March 1984 aboard a scientific satellite. VITA built upon that experiment's success and developed and operated a more advanced system. Through its experimental efforts VITA has been instrumental in the development of innovative equipment such as inexpensive earth stations and field units that automatically track and communicate with spacecraft. Further, unlike other LEO proposals, the VITA system would support direct terminal-to-terminal network operations between ground stations without use of an expensive hub or gateway. These efforts predated by years the efforts of both ORBCOMM and STARSYS.[31] We believe that VITA's efforts have advanced the authorization of the new service established by this proceeding that will provide reliable, low-cost data communications between ground stations located around the world. No party contests the tentative grant of a pioneer's preference to VITA. For the above reasons, we are awarding VITA a pioneer's preference for a license to operate a LEO system on the frequencies below 1 GHz that are allocated for this service.

36. We also made an initial determination to deny the requests for pioneer's preference filed by ORBCOMM and STARSYS. The Commission tentatively concluded that both ORBCOMM and STARSYS did not meet the burden of demonstrating significant innovation, and that consideration by ORBCOMM and STARSYS of the core concept of using the VHF spectrum for non-voice services through the use of LEOs was predated by VITA's early developmental efforts that included an experimental operating system.

37. Both ORBCOMM and STARSYS seek to have the Commission reverse its tentative decision to deny their requests for pioneer's preference. ORBCOMM argues that the Commission should recognize with a pioneer's preference the efforts that it undertook in developing its LEO

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[26] *See* ORBCOMM comments at 12 and 27.

[27] *See Introduction of LEO Satellites below 1 GHz*, in LEOSAT comments, Attachment C, filed on December 24, 1991.

[28] *See Below 1 GHz LEO Negotiated Rule Making, supra.*

[29] The pioneer's preference regulations are codified at 47 C.F.R. Sections 1.402, 1.403, 5.207. *See Establishment of Procedures to Provide a Preference*, Report and Order, 6 FCC Rcd 3488 (1991) (*Report and Order*); recon. granted in part, Memorandum Opinion and Order, 7 FCC Rcd 1808 (1992); further recon. pending.

[30] *See Tentative Decision supra.*

[31] In this instance the time difference is significant. VITA initiated its experimentation with a system in the early 1980's and applied for an experimental license for a more advanced system in 1988, well before either ORBCOMM (which first applied for experimental license in 1990) or STARSYS (which first applied for experimental license in 1991). As we noted in our recent Tentative Decision in GEN Docket No. 90-314, 7 FCC Rcd 7794, 7801 at footnote 12 (1992), we believe it appropriate to consider timing when differences are significant.

satellite system, including its development of new launch vehicle technologies and its DCAAS system. ORBCOMM contends that the Commission failed to recognize the nature and extent of ORBCOMM's pioneering work and that it has demonstrated the feasibility of its system. On the other hand, STARSYS argues that ORBCOMM's reliance on innovations in launch technology adds nothing to its justification for a pioneer's preference; that ORBCOMM did not meet the burden of the pioneer's preference rule; and that ORBCOMM failed to demonstrate the innovativeness and feasibility of its proposal.

38. After reviewing the information submitted by ORBCOMM in response to our *Tentative Decision*, we continue to believe that ORBCOMM has not demonstrated that its efforts merit a pioneer's preference.[32] In particular, ORBCOMM relies heavily on advances in launch technology that are not innovations in communications. We reiterate that this Commission will not consider non-communications developments such as launch technologies as the basis for a pioneer's preference for a communications license. ORBCOMM'S argument that under our pioneer's preference rules we must consider an applicant's contributions to innovations and developments not related directly to communications technology or service is unavailing. We stated very clearly in the *Report and Order* adopting the pioneer's preference rules that those rules address a licensing preference to parties "associated with the development of new *communications* services and technologies" (emphasis added).[33]

39. The information submitted by ORBCOMM in response to our Tentative Decision does not convince us that ORBCOMM's efforts in developing frequency compatibility techniques and a channel scanning system are new or different from those that any new system designer would be expected to accomplish. As for demonstrating on paper the feasibility of its system, in its comments ORBCOMM misinterprets the basis for our tentative denial.[34] In the Tentative Decision, having determined that within the record before us there had not been proposed a new communications innovation or technology that meets the standard for considering award of a pioneer's preference, there was no reason for us to reach the issue of technical feasibility and we did not do so.[35] Finally, as we indicated in the *Tentative Decision*, the efforts of ORBCOMM related to using narrowband VHF/UHF channels for a data service were significantly predated by VITA's experiments. For these reasons we deny ORBCOMM's request for pioneer's preference.

40. STARSYS requests that we grant it a pioneer's preference, contending that we did not clearly state our reasons for rejecting its request and did not recognize its efforts in developing technologies, such as Doppler frequency shift for position determination, that are critical to the implementation of LEOs.

41. In the *Tentative Decision*, we stated that STARSYS failed to meet our standard for pioneer's preference awards because it had not demonstrated to us that its satellite system proposal is a particularly new or innovative contribution to communications technology that advances a commercial LEO communications satellite system. Its proposal clearly was preceded significantly by the earlier VITA efforts. We found no basis for finding its spread spectrum technology to be unique or innovative. Similarly, its use of Doppler frequency shift for radio determination purposes does not appear to be particularly innovative inasmuch as this basic technology already is one of two methods used by the communications satellite industry to perform position determination[36] and has been used in other position determination designs, such as the "TRANSIT-SAT" navigation satellite system. For these reasons, we deny STARSYS' pioneer's preference request.

ADMINISTRATIVE

Final Regulatory Analysis

42. Pursuant to 5 U.S.C. § 603, an initial Regulatory Flexibility Analysis was incorporated in the *Notice* in ET Docket No. 91-280. Written comments on the proposals in the *Notice*, including the Regulatory Flexibility Analysis, were requested.

43. *Need for and Objective of Rules.* Our objective is to accommodate demand for relatively narrowband mobile-satellite data services that can be provided by low-Earth orbit satellites in segments of the VHF and UHF bands. We expect that implementation of this new service will satisfy a growing demand for data messaging and position determination services at an affordable cost.

44. *Issues raised by the Public in Response to the Initial Analysis.* Several parties suggested modifications to the proposals set forth in the *Notice*, although not specifically to the initial regulatory flexibility analysis. As a result, we have made certain modifications to our proposals, including the conditions that will govern operation in the 148-149.9 MHz band, that will facilitate sharing of the band by LEO operators and incumbent users.

45. *Any Significant Alternative Minimizing Impact on Small Entities and Consistent with stated Objectives.* The alternative to allocating these bands to LEO-MSS is to accommodate this service in other spectrum. After balancing the needs of the LEO-MSS service with the option of allocating this service in another band, we have concluded that the bands proposed in the *Notice* are the most desirable for LEO-MSS and the most compatible for sharing with existing operations.

ORDERING CLAUSE

46. Accordingly, IT IS ORDERED that Part 2 of the Commission's Rules and Regulations IS AMENDED as specified in Appendix A, effective 30 days after publication in the Federal Register. This action is taken pursuant to sections 4(i), 303(c), (f), (g), and (r), and 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. sections 154(i), 303(c), (f), (g), and (r).

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[32] *See supra* note 29.
[33] *Report and Order, supra* note 29 at para. 1.
[34] ORBCOMM Comments at 10-11.
[35] *See Tentative Decision, supra* note 2 at para. 17.
[36] The other commonly used method is measuring time delay.

47. Further, IT IS ORDERED that a pioneer's preference is awarded VITA for a license to construct a LEO-MSS satellite system in the bands allocated in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

§ 2.106 Table of Frequency Allocations.

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International Table			United States Table		FCC use designators	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*	*	*
137.0-137.025 SPACE OPERATION (space-to-Earth). METEOROLOGICAL-SATELLITE (space-to-Earth). SPACE RESEARCH (space-to-Earth). MOBILE-SATELLITE (space-to-Earth) 5998. Fixed. Mobile except aeronautical mobile(R). 596 597 598 599 599A			137.0-137.025 SPACE OPERATION (space-to-Earth). METEOROLOGICAL-SATELLITE (space-to-Earth). SPACE RESEARCH (space-to-Earth). MOBILE-SATELLITE (space-to-Earth) 5998 US318 US319 US320. 599A	137.0-137.025 SPACE OPERATION (space-to-Earth). METEOROLOGICAL-SATELLITE (space-to-Earth). SPACE RESEARCH (space-to-Earth). MOBILE-SATELLITE (space-to-Earth) 5998 US318 US319 US320. 599A	SATELLITE COMMUNICATION (25).	
*	*	*	*	*	*	*

§ 2.106 Table of Frequency Allocations.

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International Table			United States Table		FCC use designators	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*		*
137.025-137.175 SPACE OPERATION (space-to-Earth). METEOROLOGICAL-SATELLITE (space-to-Earth). SPACE RESEARCH (space-to-Earth). Mobile-Satellite (space-to-Earth) 5998. Fixed. Mobile except aeronautical mobile (R). 596 597 598 599 599A			137.025-137.175 SPACE OPERATION (space-to-Earth). METEOROLOGICAL-SATELLITE (space-to-Earth). SPACE RESEARCH (space-to-Earth). Mobile-Satellite (space-to-Earth) 5998 US318 US319 US320. 599A	137.025-137.175 SPACE OPERATION (space-to-Earth). METEOROLOGICAL-SATELLITE (space-to-Earth). SPACE RESEARCH (space-to-Earth). Mobile-Satellite (space-to-Earth) 5998 US318 US319 US320. 599A	SATELLITE COMMUNICATION (25).	
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§ 2.106 Table of Frequency Allocations.

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International Table			United States Table		FCC use designators	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*	*	*
137.175-137.825 SPACE OPERATION (space-to-Earth). METEOROLOGICAL-SATELLITE (space-to-Earth). SPACE RESEARCH (space-to-Earth). MOBILE-SATELLITE (space-to-Earth) 599B. Fixed. Mobile except aeronautical mobile(R). 596 597 598 599 599A			137.175-137.825 SPACE OPERATION (space-to-Earth). METEOROLOGICAL-SATELLITE (space-to-Earth). SPACE RESEARCH (space-to-Earth). MOBILE-SATELLITE (space-to-Earth) 599B US318 US319 US320. 599A	137.175-137.825 SPACE OPERATION (space-to-Earth). METEOROLOGICAL-SATELLITE (space-to-Earth). SPACE RESEARCH (space-to-Earth). MOBILE-SATELLITE (space-to-Earth) 599B US318 US319 US320. 599A	SATELLITE COMMUNICATION (25).	
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§ 2.106 Table of Frequency Allocations.

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International Table			United States Table		FCC use designators	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*		*
137.825-138 SPACE OPERATION (space-to-Earth). METEOROLOGICAL-SATELLITE (space-to-Earth). SPACE RESEARCH (space-to-Earth). Mobile-Satellite (space-to-Earth) 599B. Fixed. Mobile except aeronautical mobile (R). 596 597 598 599 599A			137.825-138 SPACE OPERATION (space-to-Earth). METEOROLOGICAL-SATELLITE (space-to-Earth). SPACE RESEARCH (space-to-Earth). Mobile-Satellite (space-to-Earth) 599B US318 US319 US320. 599A	137.825-138 SPACE OPERATION (space-to-Earth). METEOROLOGICAL-SATELLITE (space-to-Earth). SPACE RESEARCH (space-to-Earth). Mobile-Satellite (space-to-Earth) 599B US318 US319 US320. 599A	SATELLITE COMMUNICATION (25).	

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§ 2.106 Table of Frequency Allocations.

International Table			United States Table		FCC use designators	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*		*
148-149.9 FIXED. MOBILE except aeronautical mobile (R). MOBILE-SATELLITE (Earth-to-space) 5998. 608 608A 608C	148-149.9 FIXED. MOBILE. MOBILE-SATELLITE (Earth-to-space) 5998. 608 608A 608C		148-149.9 FIXED. MOBILE. MOBILE-SATELLITE (Earth-to-space) 5998 US319 US320 US323 US325. 608 608A US10 G30	148-149.9 MOBILE-SATELLITE (Earth-to-space) 5998 US319 US320 US323 US325. 608 608A US10	SATELLITE COMMUNICATION (25).	
149.9-150.05 RADIONAVIGATION-SATELLITE. LAND MOBILE-SATELLITE (Earth-to-space) 5998 6098. 6088 609 609A			149.9-150.05 RADIONAVIGATION-SATELLITE MOBILE-SATELLITE (Earth-to-space) 5998 US319 US322. 6088 609A	149.9-150.05 RADIONAVIGATION-SATELLITE MOBILE-SATELLITE (Earth-to-space) 5998 US319 US322. 6088 609A		
*	*	*	*	*		*

§ 2.106 Table of Frequency Allocations.

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International Table			United States Table		FCC use designators	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*	*	
399.9-400.05 RADIONAVIGATION-SATELLITE. 609 6458			399.9-400.05 RADIONAVIGATION-SATELLITE. MOBILE-SATELLITE (Earth-to-space) US319 US326. 6458	399.9-400.05 RADIONAVIGATION-SATELLITE. MOBILE-SATELLITE (Earth-to-space) US319 US326. 6458		

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§ 2.106 Table of Frequency Allocations.

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International Table			United States Table		FCC use designators	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*	*	
400.15-401 METEOROLOGICAL AIDS METEOROLOGICAL-SATELLITE (space-to-Earth). SPACE RESEARCH (space-to-Earth) 647A. MOBILE-SATELLITE (space-to-Earth) 599B. Space Operation (space-to-Earth). 647 647B			400.15-401 METEOROLOGICAL AIDS (radiosonde). METEOROLOGICAL-SATELLITE (space-to-Earth). SPACE RESEARCH (space-to-Earth) 647A. MOBILE-SATELLITE (space-to-Earth) 599B US319 US320 US324. Space Operation (space-to-Earth). 647 647B US70	400.15-401 METEOROLOGICAL AIDS (radiosonde). SPACE RESEARCH (space-to-Earth). 647A. MOBILE-SATELLITE (space-to-Earth). 599B US319 US320 US324. Space Operation (space-to-Earth). 647 647B US70	SATELLITE COMMUNICATION (25).	

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APPENDIX A: RULE CHANGES

I. Part 2 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 2 - - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation in Part 2 continues to read:

AUTHORITY: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 154(i), 302, 303, 303(r), and 307, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations is amended as follows:

a. In the band 137-138 MHz add new footnote 599A; in the bands 137-138, 148-149.9, 149.9-150.05, and 400.15-401 MHz add the footnote 599B; in the band 148-149.9 add the footnote 608A; in band 149.9-150.05 MHz add the footnotes 608B and 609B; and in the 400.15-401 MHz band, add the footnotes 647A and 647B (for columns 1, 2, 3, 4, and 5). Also, in the band 149.9-150.05 MHz add the footnote 609B (column 1, 2, and 3).

b. In the band 137-138 MHz add a new footnote US318 to columns 4 and 5.

c. In the bands 137-138, 148-149.9, 399.9-400.05, and 400.15-401 MHz add a new footnote US319 to columns 4 and 5.

d. In the bands 137-138, 148-149.9, and 400.15-401 MHz add a new footnote US320 to columns 4 and 5.

e. In the bands 137-138, 148-149.9, 149.9-150.05, 399.9-400.05, and 400.05-401 MHz bands, add a reference to mobile-satellite to columns 4 and 5 as shown in the attached tables.

f. In the 149.9-150.05 MHz band add a new footnote US322 to columns 4 and 5.

g. In the band 148-149.9 MHz add a new footnote US323 to columns 4 and 5.

h. In the band 400.15-401 MHz add a new footnote US324 to columns 4 and 5.

i. In the band 148-149.9 MHz add a new footnote US325 to columns 4 and 5.

j. In the band 399.9-400.05 MHz add a new footnote US326 to columns 4 and 5.

INTERNATIONAL FOOTNOTES

[599A] The use of the band 137 - 138 MHz by the mobile-satellite service is subject to the application of the coordination and notification procedures set forth in RES46 (WARC-92). However, coordination of a space station of the mobile-satellite service with respect to terrestrial services is required only if the power flux-density produced by the station exceeds -125 dB(W/m^2/4 kHz) at the Earth's surface. The above power flux-density limit shall apply until such time as a competent world administrative radio conference revises it. In making assignments to the space stations in the mobile-satellite service in the above band, administrations shall take all practicable steps to protect the radio astronomy service in the 150.05-153 MHz band from harmful interference from unwanted emissions.

[599B] The use of the bands 137 - 138 MHz, 148 - 149.9 MHz and 400.15 - 401 MHz by the mobile-satellite service and the band 149.9 - 150.05 MHz by the land mobile-satellite service is limited to non-geostationary-satellite systems.

[608A] The use of the band 148 - 149.9 MHz by the mobile-satellite service is subject to the application of the coordination and notification procedures set forth in RES46 (WARC-92). The mobile-satellite service shall not constrain the development and use of fixed, mobile and space operation services in the band 148 - 149.9 MHz. Mobile earth stations in the mobile-satellite service shall not produce a power flux-density in excess of -150 dB(W/m^2/4 kHz) outside national boundaries.

[608B] The use of the band 149.9 - 150.05 MHz by the land mobile-satellite service is subject to the application of the coordination and notification procedures set forth in RES46 (WARC-92). The land mobile-satellite service shall not constrain the development and use of the radionavigation-satellite service in the band 149.9 - 150.05 MHz. Mobile earth stations of the mobile-satellite service shall not produce a power flux-density in excess of -150 dB(W/m^2/4kHz) outside national boundaries.

[608C] Stations of the mobile-satellite service in the band 148-149.9 MHz shall not cause harmful interference to, or claim protection from stations of the fixed or mobile services in the following countries: Algeria, the Federal Republic of Germany, Saudi Arabia, Australia, Austria, Bangladesh, Belarus, Belgium, Brunei Darussalam, Bulgaria, Cameroon, Canada, Cyprus, Colombia, Congo, Cuba, Denmark, Egypt, the United Arab Emirates, Ecuador, Spain, Ethiopia, the Russian Federation, Finland, France, Ghana, Greece, Honduras, Hungary, Iran, Ireland, Iceland, Israel, Italy, Japan, Jordan, Kenya, Libya, Liechtensteinn, Luxembourg, Malaysia, Mali, Malta, Mauritania, Mozambique, Namibia, New Zealand, Norway, Oman, Pakistan, Panama, Papua New Guinea, the Netherlands, Phillippines, Poland, Portugal, Qatar, Syria, Romania, the United Kingdom, Singapore, Sri Lanka, Sweden, Switzerland, Suriname, Swaziland, Tanzania, Chad, the Czech and Slovak Federal Republic, Thailand, Tunisia, Turkey, Ukraine, Yemen and Yugoslavia that operate in accordance with the Table of Frequency Allocations.

[609B] In the band 149.9-150.05 MHz, the allocation to the land mobile-satellite service shall be on a secondary basis until 1 January 1997.

[647A] The band 400.15 - 401 MHz is also allocated to the space research service in the space-to-space direction for communications with manned space vehicles. In this application, the space research service will not be regarded as a safety service.

[647B] The use of the band 400.15 - 401 MHz by the mobile-satellite service is subject to the application of the coordination and notification procedures set forth in Resolution 46 (WARC-92). However, coordination of a space station of the mobile-satellite service with respect to terrestrial services is required only if the power flux-density produced by the station exceeds -125 dB(W/m^2/4kHz) at the Earth's surface. The above power flux-density limit shall apply until such time as a competent world administrative radio conference revises it. In making assignments to the space stations in the mobile-satellite service in the above band, administrations shall take all practicable steps to protect the radio astronomy service in the band 406.1 - 410 MHz from harmful interference from unwanted emissions.

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UNITED STATES (US) FOOTNOTES

US318 Until January 1, 2000, the use of the 137-138 MHz band by the mobile-satellite service will be secondary to Government satellite operations in the subbands: 137.333-137.367, 137.485-137.515, 137.605-137.635 and 137.753-137.787 MHz.

US319 In the 137-138, 148-149.9, 149.9-150.05, 399.9-400.05, and 400.15-401 MHz bands, Government stations in the mobile-satellite service shall be limited to earth stations operating with non-Government satellites.

US320 Use of the 137-138, 148-149.9, and 400.15-401 MHz bands by the mobile-satellite service is limited to non-voice, non-geostationary satellite systems and may include satellite links between land earth stations at fixed locations.

US322 The 149.9-150.05 MHz band is allocated to the mobile-satellite service (Earth-to-space) on a primary basis after 1 January 1997 and shall be limited to non-voice, non-geostationary satellite systems, including satellite links between land earth stations. Before 1 January 1997 use of this band on a secondary basis for the mobile satellite service is allowed for land earth stations at fixed locations.

US323 In the 148-149.9 MHz band, no individual mobile earth station shall transmit, on the same frequency being actively used by fixed and mobile stations and shall transmit no more than 1% of the time during any 15 minute period; except, individual mobile earth stations in this band that do not avoid frequencies actively being used by the fixed and mobile services shall not exceed a power density of -16 dBW/4kHz and shall transmit no more than 0.25% of the time during any 15 minute period. Any single transmission from any individual mobile earth station operating in this band shall not exceed 450 ms in duration and consecutive transmissions from a single mobile earth station on the same frequency shall be separated by at least 15 seconds. Land earth stations in this band shall be subject to electromagnetic compatibility analysis and coordination with terrestrial fixed and mobile stations.

US324 Government and non-Government satellite systems in the 400.15-401 MHz band shall be subject to electromagnetic compatibility analysis and coordination.

US325 In the band 148-149.9 MHz fixed and mobile stations shall not claim protection from land earth stations in the mobile-satellite service that have been previously coordinated; Government fixed and mobile stations exceeding 27 dBW EIRP, or an emission bandwidth greater than 38 kHz, will be coordinated with existing mobile-satellite service space stations. US326 The 399.9-400.05 MHz band is allocated to the mobile-satellite service (Earth-to-space) on a primary basis after January 1, 1997 and shall be limited to non-voice, non-geostationary satellite systems, including satellite links between land earth stations.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Applications of

CENTEL CORPORATION,
Transferor,

and File No. 08374-CL-TC-1-92 et al

SPRINT CORPORATION,
and F W Sub Inc.,
Transferees,

For Consent to the Transfer of
Control of Authorizations in the
Domestic Public Cellular Radio
Telecommunications Service and
Other Common Carrier Services.

MEMORANDUM OPINION AND ORDER

Adopted: March 4, 1993; Released: March 4, 1993

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In this order, we address applications filed jointly by Sprint Corporation ("Sprint")[1] and Centel Corporation ("Centel")[2] that seek the Commission's consent to transfer control to Sprint of common carrier radio authorizations held by Centel subsidiaries and affiliates. For reasons discussed below, we grant the applications.

II. BACKGROUND

2. On May 27, 1992, Centel and Sprint ("Applicants") entered into an Agreement and Plan of Merger ("Merger Agreement")[3] to merge their companies through an exchange of stock valued at $2.85 billion.[4] Thereafter, on August 31, 1992, the applications here before us were filed pursuant to Section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(d).[5] Under the proposed transaction, Centel would become a wholly-owned subsidiary of Sprint.[6] The merged company would have assets of $14 billion and estimated initial annual revenues of $10 billion. According to Applicants, these additional resources, plus efficiencies of scale and scope that the merger would permit, "will better position the parties for facing the complex and rapidly changing telecommunications environment of the 1990s and beyond and will inure to the benefit of their customers.[7] Applicants also state that the proposed merger does not pose any anticompetitive concerns under Section 7 of the Clayton Act, noting, *inter alia*, that the addition of Centel's local exchange and cellular companies to those of Sprint will give Sprint control over only 4 percent of the access lines nationwide.[8]

3. The applications and the common carrier licensee companies involved were listed in a public notice in this matter.[9] Parties wishing to comment on any of the matters referenced in the Public Notice were invited to do so no later than November 30, 1992, and Applicants were authorized to file reply comments by December 13, 1992.[10]

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[1] Sprint, a Kansas corporation, is a diversified telecommunications company providing global voice, data and videoconferencing services and related products. It provides long-distance telephone service to over 6 million customers. Through seven operating units, Sprint's local telephone companies serve over 4 million customer lines and provide access service to interexchange carriers in 17 states. Nearly 90 percent of these customers are served by digital technology. Sprint companies also provide cellular communications in 27 cellular rural service areas. File No. 08374-Cl-TC-1-92, FCC Form 490, Exh. 3 ("Application") at 1.

[2] Centel, a Kansas corporation, provides local exchange telephone services through its telephone subsidiaries to nearly 1.6 million customer lines and access service to interexchange carriers in Florida, Illinois, Nevada, North Carolina, Texas and Virginia. Centel's telephone companies also hold various paging and other authorizations under Part 22 of the Commission's Rules. Centel provides cellular communications in 14 states, owns controlling interests in 66 markets and has interests in over 50 others for a combined population of 16.7 million, adjusted for percentage of ownership. Through Centel Videopath, Centel provides microwave links in the Chicago area for connecting local cable television systems, downlinking and uplinking and remote pickups for Chicago television stations, and for other miscellaneous services. *Id.*

[3] A copy of the Merger Agreement is attached as Exhibit 3 to the lead application in this matter.The merger would be effected pursuant to such agreement by F W Sub Inc., a wholly-owned subsidiary of Sprint created for this purpose, being merged with and into Centel, with Centel being the surviving company. Following the merger, the licenses and authorizations currently held by Centel's subsidiaries and affiliates will continue to be held by those companies and partnerships.

[4] *See* The Washington Post, May 28, 1992, Section B at 10, col. 1; Telecommunications Reports, June 1, 1992, at 13. Under the proposed stock swap, Centel shareholders would exchange each of their shares for 1.37 shares of Sprint and own about one-third of Sprint's outstanding common stock. Application at 2.

[5] Section 310(d) provides generally that no radio construction permit, station license, or any rights thereunder shall be transferred without an application to the Commission and its finding that the public interest, convenience and necessity will be served.

[6] On September 10, 1992, Applicants filed a "Request for Declaration of Common Ownership" under the Interlocking Directors statute, 47 U.S.C. §212, seeking a finding that, upon consummation of the proposed merger, the two companies will be "commonly owned carriers" within the meaning of Part 62 of the Commission's rules implementing that statute. That request was granted on September 17, 1992. *See* File No. EID 683.

[7] Application at 9.

[8] *Id.* at 10.

[9] Public Notice, Mimeo No. 30278, Report No. CL-93-16 (Oct. 26, 1992) ("Public Notice").

[10] *Id.* at 5.

4. On November 24, 1992, The Orwell Telephone Company ("Orwell") filed a "Petition To Deny or, Alternatively, To Grant With Conditions" directed against six of the subject applications, which seek consent to transfer control of Toledo MSA Limited Partnership and Youngstown-Warren MSA Limited Partnership.[11] Orwell, a limited partner in those Centel-managed partnerships, asks the Commission to interpret terms of the partnership agreements as requiring Applicants to submit the proposed change of control of the partnerships to a vote of the limited partners. Alternatively, Orwell asks us to suspend processing of the applications to afford it an opportunity to pursue its claim in the courts.[12] Orwell also questions whether Sprint has adequately demonstrated its financial ability to operate the facilities to be transferred.[13] In any event, Orwell maintains that grant of the subject applications should be conditioned to require Sprint to maintain separate books of account for its cellular operations in order to minimize the possibility of "prohibited cross-subsidization" between its regulated and deregulated activities.[14]

5. On November 25, 1992, American Message Centers ("AMC") filed a Petition to Deny which opposes grant of all of the subject applications. AMC seeks a trial-type hearing under Section 309(e) of the Communications Act[15] to determine whether Sprint possesses the character qualifications to be a Commission licensee because of a substantial factual misrepresentation AMC alleges Sprint made in a formal complaint proceeding.[16] On January 13, 1993, after the close of the record herein, AMC filed a supplement to its Petition to Deny and a motion for leave to file such supplement, stating that it had uncovered new evidence that Sprint knowingly withheld relevant documentary evidence in the formal complaint case. Applicants contend that the allegations raised in the supplement are without merit and that AMC's complaint and unauthorized supplement filings here constitute a misuse of the Commission's processes.[17] AMC contends that its supplement and accompanying motion stand unopposed.[18]

6. On November 30, 1992, Francesco Galesi ("Galesi") filed comments alleging that, late in 1983, Centel unlawfully acquired *de facto* control of Argo Communications Corp. ("Argo"), a former Commission licensee. Galesi sought a Commission investigation whether, in light of his allegations, Centel is qualified to transfer the subject licenses.[19] The actions of Centel about which Galesi complained were the subject of a civil suit[20] and a related bankruptcy proceeding.[21]

7. On December 14, 1992, Applicants timely filed a joint response to Galesi's comments and to the petitions to deny filed by AMC and Orwell.[22] Applicants contend that AMC, Orwell and Galesi lack standing to participate formally in this proceeding.[23] According to Applicants, the petitions and comments "represent nothing more than an effort to misuse Commission transfer processes to pursue purely private claims ...."[24] and should be summarily dismissed or denied.[25]

III. DISCUSSION

8. Section 310(d) of the Act requires that the Commission find that the public interest, convenience, and necessity will be served by the transfer of control of a company holding radio licenses. Subsumed therein is the requirement that we review, as may be appropriate, the citizenship, character, financial, technical and other qualifications

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[11] File Nos. 08431-CL-TC-1-92, 08432-CL-TC-1-92, 13622-CF-TC-92 (Toledo MSA) and File Nos. 08438-CL-TC-1-92, 08439-CL-TC-1-92, 13619-CF-TC-92 (Youngstown-Warren MSA).

[12] *See* Orwell's reply to the Joint Opposition, filed December 21, 1992, at 2-3.

[13] Orwell maintains that Sprint made no attempt to comply with guidelines in Section 22.917 of the Commission's Rules, 47 C.F.R. § 22.917, concerning types of financial showings acceptable to the Commission.

[14] Orwell reply at 3-7.

[15] Section 309(e) requires the Commission to formally designate the subject applications for a full evidentiary hearing if a substantial and material question of fact is presented or, for any reason, it is unable to find that the public interest would be served by their grant.

[16] *AMC v. Sprint,* File No. E-91-116. In this formal complaint proceeding, AMC, a customer of a reseller of Sprint's service, is disputing certain Sprint charges.

[17] Letter from Jay C. Keithley and R. Michael Senkowski to Donna R. Searcy (Jan. 15, 1993).

[18] Letter from Russell D. Lukas to John Cimko (Jan.28, 1993). On February 4, 1993, AMC filed a motion for leave to file a second supplement to its petition to deny, accompanied by such supplement seeking to introduce further newly-discovered evidence on the alleged misrepresentation issue pending in its complaint proceeding.

[19] Comments and Request for Investigation ("Galesi Comments"). Argo was founded by Galesi and others in 1981 to provide long-distance telecommunications services. *Id.* at 2. Galesi had filed a motion seeking to extend the filing deadline for filing comments, and a corresponding extension of the filing date for reply comments, in this proceeding pending developments in related litigation in which he and Centel were then directly or indirectly involved. That motion was denied. Letter from Gregory A. Weiss to John T. Scott, III (Nov. 30, 1992), 7 FCC Rcd. 7964 (Enf. Div., Com. Car. Bur. 1992).

[20] Galesi v. Centel Network Co., No. 89 Civ. 8355 (MJL) (S.D.N.Y.). In his amended complaint in such litigation, Galesi claimed that Centel or its wholly-owned subsidiary, Centel Network Company, had driven Argo into bankruptcy for which Galesi sought $200 million in damages. *See* Joint Opposition of Centel Corporation and Sprint Corporation to Petitions to Deny and Comments (Dec. 14, 1992) ("Joint Opposition") at 20.

[21] Pereira v. Centel Corp. (In re Argo Communications Corp.), Adv. Proc. No. 91-5237 (Bankr. S.D.N.Y.). The court dismissed that proceeding on January 20, 1993 following a settlement.

[22] Joint Opposition, *supra.* At Applicants' request, the time under the Commission's Rules for filing an opposition to the petitions to deny was extended by the Deputy Chief of the Bureau's Mobile Services Division to coincide with the filing date for reply comments previously specified in the Public Notice.

[23] *Id.* at 9.

[24] *Id.* at 43. Applicants state that prior to the deadline for comments on the merger applications, AMC informed Sprint of its intention to oppose the merger unless its pending complaint against Sprint was promptly settled. Applicants further state that another transfer opponent, Galesi, similarly expressed his intent to oppose the merger if settlement of his private lawsuit against Centel's subsidiary was not promptly reached. Applicants contend that we should not countenance "these efforts to disrupt and misuse the Commission's transfer processes ...." *Id.* at 2, 21,n.28.

[25] *See id.* at 1-5, 11-17, 42.

of the transferee applicant.[26] After reviewing the subject applications and the record in this proceeding, we conclude that Sprint satisfies the Commission's threshold qualification requirements. As explained previously, the proposed merger will be consummated solely by issuing Sprint stock. Sprint will not spend its own funds or incur any liabilities in order to acquire Centel stock. In addition, Sprint has certified that following the merger, its combined assets will be $14 billion and it estimates initial annual revenues of $10 billion. Furthermore, Sprint is a long-term Commission licensee and interstate and international communications common carrier. Consequently, Sprint has the financial wherewithal and technical expertise to ensure that communications services provided by its subsidiaries and affiliated companies are consistent with the public interest.

Orwell's Petition to Deny or for Conditional Grant

9. Orwell contends that the applications for the proposed transfers of control should be denied because Applicants' decision to merge violates the partnership agreements to which Orwell and a subsidiary of Centel, TeleSpectrum, Inc.,[27] are signatories, and because Sprint has failed to demonstrate that it has the financial resources to operate the subject facilities for one year. Alternatively, if the applications are granted, Orwell requests that Sprint be required to maintain separate books of account for cellular and other operations in order to prevent it from improperly cross-subsidizing its rate regulated and other business activities, *e.g.*, cellular telephone systems.

10. Orwell's arguments are unavailing. First, the alleged violation of the partnership agreements amounts to a contractual dispute between Orwell and Centel, and, therefore, a matter for resolution by a private cause of action, rather than resolution by the Commission. The Commission has repeatedly stated that it is not the proper forum for the resolution of private contractual disputes, noting that these matters are appropriately left to the courts or to other fora that have the jurisdiction to resolve them.[28] Orwell bases its claim that Sprint has failed to demonstrate that it is financially qualified to assume control of Centel's facilities on Section 22.917(d) of the Commission's Rules. That section, however, does not, as argued by Orwell, require a demonstration that Sprint has the financial resources to operate these facilities for one year. The Commission has held that this requirement applies to unbuilt cellular facilities, and not, as in the matter before us, to operational facilities.[29] Consequently, Sprint is not required to make the showing that Orwell has defined.[30] Finally, we see no reason to impose upon Sprint Orwell's proposed safeguards against potential cross-subsidization. The Commission has stated that it would rely upon its formal complaint procedures to resolve charges of improper cross-subsidization, particularly predatory pricing, of non-regulated activities with revenues derived from regulated interstate services.[31] Therefore, because Orwell has made no accusation of improper cross-subsidization, either formal or informal, its request that extraordinary conditions accompany the grant of the subject applications is unwarranted.[32]

AMC's Petition to Deny

11. AMC's petition seeks a trial-type FCC hearing to determine whether Sprint possesses the requisite character qualifications to be a Commission licensee. The bases for such request are Sprint representations in the pending proceeding on AMC's formal complaint that Sprint never received any money from its customer, Telecom Management Systems, Inc. ("TMS"), as payment for charges for certain telecommunications services in issue in the complaint proceeding.[33] According to AMC, Sprint misrepresented the facts. Applicants contend that AMC's claims are unrelated to the proposed merger, the pending complaint proceeding is the appropriate venue for resolving those claims, and approval of the merger will not prevent the Commission from taking whatever action it deems appropriate in that proceeding.

12. Parties challenging an application and who seek a hearing must satisfy a two-pronged test established in Sections 309(d)(1) and d(2) of the Act. *See Astroline Communications Company Limited Partnership v. FCC*, 857 F.2d 1556, 1557 (D.C. Cir. 1988) (*"Astroline"*). The petitioning party must present "specific allegations of fact sufficient to show . . . that grant of the application would be prima facie inconsistent with [the public interest, convenience and necessity]." 47 U.S.C. § 309(d)(1). In conducting its inquiry, the Commission must proceed "on the assumption that the specific facts set forth [in the petition] are true." *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985). If the Commission finds that the petitioning party has made a *prima facie* showing that grant of the application would be inconsistent with the public interest, the Commission must then determine whether, "on the basis of the application, the pleadings filed, or other matters which it may officially notice[,] . . . a substantial and material question of fact is presented." 47 U.S.C. § 309(d)(2). *See Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987). If the Commission concludes that such a question of fact has been raised, or if it cannot, for any reason, find that grant of the application would be consistent with the public interest, it must conduct a hearing in accordance with 47 U.S.C. Section 309(e).

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[26] Contel/GTE Merger, 6 FCC Rcd 1003, 1004-5 (1991); *see also* 47 U.S.C. §§ 308(b), 310(d).

[27] TeleSpectrum, Inc. is the sole general partner of each of the subject partnerships.

[28] *See e.g.*, Kingsberry, 71 FCC 2d 1173, 1174 (1979).

[29] *See* Kile, 5 FCC Rcd 513 (1990).

[30] Our review of the Commission's records indicates that neither Centel nor any of its affiliates holds any construction authorization for unbuilt facilities in the common carrier services.

[31] *See* Cellular Communications Systems, 89 FCC 2d 58, 78 (1982).

[32] It should also be noted that, at the request of the Commission staff, Sprint has confirmed that the merger will not result in any cross-block cellular holdings. *See* Letter from R. Michael Senkowski to Donna R. Searcy (Jan. 15, 1993). *See also* 47 C.F.R. § 22.902.

[33] *See* Letter from Michael B. Fingerhut to Donna M. Searcy (Sept. 3, 1992) (copy attached as Exhibit 8 of AMC's petition, File No. E-91-116). AMC alleges in its complaint that Sprint has violated Sections 201(a) and 202(b) of the Act by attempting to hold TMS liable for certain usage charges allegedly resulting from the unauthorized placement of calls from an AMC facility that were carried by Sprint. TMS, AMC's resale carrier, had attempted to recover payment for the calls billed to it by Sprint.

13. Applying the *Astroline* analysis in the instant case, we conclude that there is no need to grant AMC's hearing request. Assuming, *arguendo,* that AMC has alleged facts sufficient to show that grant of the subject applications would be *prima facie* inconsistent with the public interest, we find that AMC has not satisfied the second prong of the *Astroline* test which requires the presentation of a substantial and material question of fact. In response to AMC's claim that Sprint made misrepresentations to the Commission when it represented that it had never received payment from TMS for certain telecommunications services at issue in the complaint proceeding, Sprint has explained that its representations regarding payments received from TMS related solely to disputed charges for fraudulent calls and not to payments received from TMS for other unrelated indebtedness.[34] Sprint concedes that it had received payments from TMS at the time it filed its statements in the complaint proceeding but states, in effect, that amounts tendered were not designated by TMS as payments of any of the charges for the disputed fraudulent calls.[35] Sprint points out that the payments were substantially in excess of the disputed charges and could reasonably be attributed to any of TMS' outstanding debts to Sprint. Sprint states that it was under no obligation, legal or otherwise, to determine the source of the payments and apply them to a particular part of TMS' indebtedness to Sprint.[36]

14. We have reviewed the arguments and evidence presented by the parties in the complaint proceeding and find the statements in AMC's petition to deny that Sprint knew that its representations in that proceeding were false or incomplete when made to be based on conjecture, not facts. The primary evidence offered by AMC to support its claims are copies of cancelled checks which it claims it gave to TMS for the express purpose of making payments to Sprint for outstanding charges, including those attributable to the charges at issue in the complaint proceeding.[37] In the absence of some indication that TMS, once it received payments from AMC, specifically tendered payment to Sprint for the calls disputed in AMC's complaint, we conclude that AMC's allegations do not rebut Sprint's explanation for its representations and, therefore, do not raise a substantial and material question of fact requiring an evidentiary hearing. Accordingly, AMC's petition, as supplemented, is denied.[38]

Galesi Comments

15. In his comments and request for investigation, Galesi alleged that Centel unlawfully acquired control of Argo more than five years ago. Centel denied such allegation and the issue was the subject of litigation before a federal district court in New York. On February 22, 1993, counsel for Galesi advised that Central Network Company and Galesi had reached a settlement of the New York litigation and that, pursuant to the terms of such settlement, "Mr. Galesi hereby withdraws his Comments."[39]

16. Section 22.927 of the Commission's Rules requires, *inter alia,* that the filing party demonstrate that neither it nor its principals will receive any money or other consideration in excess of its legitimate and prudent expenses in exchange for the withdrawal of its objection. Galesi has failed to make such a demonstration. Consequently, his request to withdraw his comments is denied.

17. We find that Galesi has failed to establish sufficient cause to believe that Centel engaged in an unauthorized acquisition of *de facto* control of Argo. His allegations, which concern a former licensee that is no longer in existence, in addition to being untimely, are unavailing. We have reviewed the record with respect to the nature and extent of Centel's participation as a shareholder in Argo nearly a decade ago and are persuaded that Centel had neither the desire nor ability to assume control of Argo. Rather, it appears that up until its demise, Argo was controlled by all of its shareholders, through a board of directors of which Centel never had more than two of its seven seats. We, therefore, deny Galesi's request for institution of an investigation.[40]

Clayton Act Analysis

18. Pursuant to Section 11 of the Clayton Act, the Commission is charged with enforcing the provisions of Section 7 of that Act with respect to mergers of telecommunications entities.[41] As the Commission has noted, that requirement obligates it to "consider anticompetitive consequences as one part of [its] public interest calculus."[42]

19. In its First Report and Order in CC Docket No. 79-252,[43] after using an antitrust analysis of market power, the Commission adopted streamlined regulations for certain classes of carriers without market power (non-dominant carriers) in light of the increasingly competitive

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[34] "Opposition of Sprint," to AMC's Request for Sanctions, at 8 (filed Dec. 8, 1992) (File No. E-91-116).

[35] *Id.*

[36] *Id.*

[37] "Request for Imposition of Sanctions and Issuance of Notice of Apparent Liability" at 6 (filed Nov. 19, 1992).

[38] In light of this action, we do not reach Applicants' contention that AMC has not shown that it will be adversely affected in any tangible or substantial way by the approval of the pending transfer and, accordingly, that it lacks standing as a "party in interest" under Section 309(d)(1) of the Act to protest grant of the subject radio applications. Joint Opposition at 9.

[39] Letter from John T. Scott, III to Donna R. Searcy (Feb. 22, 1993).

[40] In light of the foregoing, we do not here decide whether Galesi's pleadings constituted attempts to misuse Commission processes in furtherance of private claims or litigation, as Applicants contend. Joint Opposition at 19-23, 43. We note that Galesi's suit against Centel Network Company before the United States District Court for the Southern District of New York was "dismissed with prejudice, without costs or disbursements to any party." Stipulation and Order of Dismissal with Prejudice (Feb. 26, 1993).

[41] 15 U.S.C. § 21.

[42] Contel/GTE Merger, *supra,* 6 FCC Rcd at 1005. *See also* United States v. FCC, 652 F.2d 72 (D.C. Cir. 1980) (en banc). We note that the Department of Justice and the Federal Trade Commission each had an opportunity to review the subject applications, as well as filings made by each of the Applicants pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18(a), and neither filed objections before the Commission to the proposed merger or otherwise questioned its lawfulness. We have independently reviewed the material filed with those agencies pursuant to the Hart-Scott-Rodino Act and have concluded that that material reveals no basis to deny the proposed transaction.

[43] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, 85 FCC 2d 1 (1980).

domestic communications market. The Commission expressly identified Southern Pacific Communications Company (a predecessor-in-interest to Sprint's current communications company) as one of the specialized common carriers it found were non-dominant carriers in the interstate interexchange market.[44]

20. No objection based on anticompetitive concerns has been raised to the grant of the subject applications, nor has any evidence been presented to show that Sprint's acquisition of Centel would have any anticompetitive effect or require a change from its current classification as a non-dominant carrier with respect to its interexchange services. In terms of total toll revenues for interexchange telecommunications,[45] AT&T had a 62.2% share of the market in 1991, MCI 15.0%, and Sprint 9.7%.[46] The addition of Centel's local exchange and cellular companies to those of Sprint will give Sprint control over only 4 percent of the access lines nationwide.[47] For the year ended December 31, 1991, based upon data filed with and compiled by the Commission,[48] the combined interstate switched and special access revenues of the Applicants' Tier 1 local exchange carriers constituted 3.7 percent of all such revenues of Tier 1 local exchange carriers. Interexchange service is provided by a separate Sprint partnership or division.[49] Further, the Commission has established comprehensive non-structural safeguards to protect against anticompetitive conduct. As Applicants note, Sprint's local telephone companies comply with cost allocation manuals on file with the Commission and, after the merger, the Centel operations will also comply with those requirements.[50] Neither Galesi nor petitioners, AMC and Orwell, contended that the proposed merger would tend to reduce competition in any relevant market. We conclude that approval of such merger will help to foster the continuing development of a competitive and high quality telecommunications marketplace.

IV. CONCLUSION

21. We conclude that the American public should benefit from Sprint's acquisition of control over Centel and Centel's licensee companies. The proposed merger should result in significant cost savings, efficiencies and synergies, and therefore in improved services and increased competitiveness in the telecommunications marketplace. Accordingly, having reviewed the applications and the pleadings filed in this matter, we conclude that Sprint possesses the legal, technical, financial and other qualifications to continue operations of the licensee companies here involved and that grant of the subject applications will serve the public interest, convenience and necessity.

V. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED, pursuant to 47 U.S.C. §§ 154(i), 154(j), 308, 309, and 310(d), and authority delegated in 47 C.F.R. § 0.291, that the applications here before us filed by Sprint Corporation and Centel Corporation on August 31, 1992, ARE GRANTED.

23. IT IS FURTHER ORDERED that Applicants' request for an exemption from the "cut-off" requirements pursuant to Section 22.23(g)(3) and Section 21.23(c)(6) of the Commission's Rules, 47 C.F.R. § 22.23(g)(3), 21.23(c)(6), IS GRANTED.

24. IT IS FURTHER ORDERED that the "Petition to Deny or, Alternatively, to Grant with Conditions" filed by Orwell Telephone Company on November 24, 1992, IS DENIED.

25. IT IS FURTHER ORDERED that the "Motion for Leave to File Supplement to Petition to Deny" filed by AMC on January 13, 1993, and its "Motion for Leave to File Second Supplement to Petition to Deny" filed February 4, 1993, ARE GRANTED.

26. IT IS FURTHER ORDERED that the "Petition to Deny" filed by American Message Centers on November 25, 1992, as supplemented, IS DENIED.

27. IT IS FURTHER ORDERED, that the request to withdraw "Comments and Request for Investigation" filed by Francesco Galesi on February 22, 1993, IS DENIED.

28. IT IS FURTHER ORDERED that the request for an investigation filed by Francesco Galesi on November 30, 1992, IS DENIED.

29. IT IS FURTHER ORDERED that the closing of the merger is contingent upon grant of applications for transfer of control of licenses in the Land Mobile Service, File Nos. 902652 through 902657, and 902659 by the Private Radio Bureau.

30. IT IS FURTHER ORDERED that the closing of the merger is contingent upon the grant of all necessary approvals by state public utility commissions or similar state regulatory bodies.

31. IT IS FURTHER ORDERED that this order IS EFFECTIVE upon its adoption.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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[44] *Id.* at 28 n.69. Southern Pacific Communications Company subsequently was acquired by GTE Corporation, which later operated as a partnership with United Telecommunications, Inc. United then bought out GTE's interest and the interexchange communications company was renamed Sprint Communications Company, which is now a wholly-owned subsidiary of Sprint. Sprint is a dominant carrier insofar as telephone exchange services provided by its telephone operating company subsidiaries are concerned.

[45] The revenues reported include both interstate and intrastate toll calls, including international calls.

[46] Long Distance Market Shares: Third Quarter, 1992, released January 8, 1993, by the Industry Analysis Division, Common Carrier Bureau, Mimeo No. 31152, at Table 5. As of June 1992, approximately 74% of the nation's telephone lines were presubscribed to AT&T, 14% to MCI, and 6% to Sprint. *Id.* at Table 4.

[47] Application at 10. *See also* United States Telephone Association, Statistics of the Local Exchange Carriers (1992) at 5,8.

[48] Preliminary Statistics of Communications Common Carriers, released September 10, 1992, by the Industry Analysis Division, Common Carrier Bureau, Mimeo No. 24746, at Table 2.9.

[49] Application at 11.

[50] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-170

In the Matter of

Spectrum Efficiency in the
Private Land Mobile Radio
Bands In Use Prior to 1968

ORDER TERMINATING PROCEEDING

Adopted: February 22, 1993; Released: March 12, 1993

By the Commission:

1. On July 2, 1991, the Commission released a *Notice of Inquiry, (Inquiry),* 6 FCC Rcd 4126 (1991), examining a variety of technical and policy issues for the private land mobile radio services in the bands primarily below 470 MHz. Based on the record of this proceeding, on October 8, 1992, we initiated a new proceeding, PR Docket No. 92-235, 7 FCC Rcd 8105 (1992), with a *Notice of Proposed Rule Making, (Notice).* The new proceeding is broader than the *Inquiry* in two major respects. First, the proposals in the *Notice* cover additional bands, particularly the 470-512 MHz and, to a more limited degree, the bands above 800 MHz. Second, the *Notice* proposes to replace Part 90, which currently governs the private land mobile radio services, with a new Part 88. Thus, we have incorporated the record of this proceeding into the record of PR Docket No. 92-235, and will terminate this proceeding.

2. Accordingly, IT IS ORDERED that under the authority contained in Sections 4 (i) and 33 of Communications Act of 1934, as amended, this proceeding IS TERMINATED without further action.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-119

In re Applications of

BREEZE BROADCASTING COMPANY, LTD.	File No. BPH-840503IC
MARANATHA BROADCASTING COMPANY, INC.	File No. BPH-850712ME
J. McCARTHY MILLER	File No. BPH-850712NT
GULF BREEZE BROADCASTING CO.	File No. BPH-850712OE

For Construction Permit for
New FM Station, Channel 237A,
Gulf Breeze, Florida

MEMORANDUM OPINION AND ORDER

Adopted: March 5, 1993; Released: March 18, 1993

By the Review Board: MARINO (Chairman), and BLUMENTHAL. Board Member ESBENSEN absent.

1. The Review Board has before it: (1) the *Initial Decision*, 5 FCC Rcd 26 (1990), of Administrative Law Judge Joseph P. Gonzalez (ALJ), which granted the application of Breeze Broadcasting Company, Ltd. (Breeze) for a new commercial FM broadcast station at Gulf Breeze, Florida; (2) a *Supplemental Initial Decision*, 7 FCC Rcd 1653 (1992), which disqualified J. McCarthy Miller (Miller) following a remand of the proceeding for further hearing on Miller's financial qualifications; and (3) exceptions and replies filed by Maranatha Broadcasting Company, Inc. (Maranatha), Gulf Breeze Broadcasting Co. (Gulf Breeze), Miller, and Breeze. For the reasons set forth below, we conclude that Gulf Breeze is the superior comparative applicant; however, because substantial and material questions of fact relating to one of Gulf Breeze's principals have been raised and not yet been resolved, we are constrained to remand this proceeding on a misrepresentation issue against Gulf Breeze.[1]

BACKGROUND

2. Initially, Breeze was selected as the superior comparative applicant under the criteria set forth in the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). Specifically, under the best practicable service objective, of which full-time participation in station operation by owners, *i.e.*, "integration," is an important factor, the ALJ awarded Breeze one hundred percent quantitative integration credit for proposing all of its voting owners into management level positions at the new facility. *I.D.*, at 33 ¶ 75. Miller and Gulf Breeze also sought one hundred percent quantitative credit, but they received sixty percent and fifty percent, respectively, relegating them to a secondary comparative posture. *Id.; see, e.g., Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5065-5066 ¶ ¶ 17-18 (1989) (enhancement attributes considered only where there are no clear quantitative integration differences among applicants) (subsequent history omitted). Although Gulf Breeze excepted to the diminution of its quantitative credit, that exception is now moot after a Gulf Breeze amendment, dated June 5, 1992, reporting that its forty percent owner Ms. Castlebury, who was denied credit, is now confined to a long-term nursing home and will be unable to effectuate her integration proposal. *See, e.g., V.O.B. Incorporated*, 5 FCC Rcd 5872, 5874-5875 ¶ ¶ 9-14 (Rev. Bd. 1990) (exception to diminution made only in death cases). The fourth applicant, Maranatha, does not propose any integration credit. *I.D.*, at 29 ¶ 28. Additionally, Maranatha received a demerit under the primary comparative objective, diversification of the control of media of mass communications, for its ownership interests in five broadcast facilities, which would further degrade its comparative position. *Id.*, at 29 ¶ ¶ 33-34; *see Bible Broadcasting Network, Inc.*, 7 FCC Rcd 4578, 4579 ¶ 7 (Rev. Bd. 1992) (even a "slight diversification advantage is sufficient to outweigh a slight advantage for integration"), *review denied*, 7 FCC Rcd 4578 (1992). Breeze also received a minor preference for proposing coverage to a slightly larger population and area. *I.D.*, at 33 ¶ 73.

3. Oral argument was held June 1, 1990, on the exceptions challenging the initial comparative conclusions. Thereafter, Breeze filed a motion to reopen the record and to enlarge issues against Miller seeking a financial qualifications issue. Because the Board was of the view that Miller was among the comparatively superior applicants, inasmuch as he was the only long-term local resident applicant with extensive civic involvement and past broadcast experience, and had sought full quantitative integration credit, we remanded the proceeding on a financial issue against Miller. *Memorandum Opinion and Order*, 5 FCC Rcd 6365 (Rev. Bd. 1990). We have carefully reviewed

[1] The Board sincerely regrets the need for yet another remand of this proceeding but it did not foresee at our last review of the *I.D.* that none of the top qualitatively enhanced applicants would emerge a comparative winner. It brings to mind an apt judicial observation:

> the matter does not appear to us now as it appears to have appeared at the time.

See Mark L. Wodlinger, 3 FCC Rcd 3139, 3145 n.9 , quoting *McGrath v. Kristensen*, 340 U.S. 162, 178 (1950) (Jackson, J. concurring); *see also Shawn Phalen*, 7 FCC Rcd 623, 628 n.3 (Rev. Bd. 1992).

both the *I.D.* and *S.I.D.*, and adopt the ALJ's findings and conclusions, except as modified below. Our discussion begins with Miller's disqualification under the financial issue.

MILLER FINANCIAL ISSUE

4. J. McCarthy Miller has been the sole principal of the applicant since the death of his wife, June, on December 10, 1988. Our remand was initiated primarily because of the large number of outstanding applications he had pending before the Commission when certifying in his Gulf Breeze application that the applicant was financially qualified. To a lesser extent, the inquiry also encompassed two FM broadcast applications filed subsequent to the Gulf Breeze application. The issue read as follows:

> To determine whether J. McCarthy Miller was financially qualified at the time he certified to his financial qualifications, has remained financially qualified throughout the pendency of his application, and is currently financially qualified.

5. Miller's original cost estimates for construction and initial operation of the Gulf Breeze facility was $126,000. *S.I.D.*, 7 FCC Rcd at 1655 ¶ 16. To establish that he could meet that cost, Miller claimed a net worth of $3,308,800, which included purported net liquid assets of $576,000. Miller Remand Exh. 1, pp. 7-8. The net liquid assets consisted of cash -- $134,000; life insurance (cash surrender) -- $50,000; coins -- $196,000; and oil leases -- $196,000; less liabilities of $105,200. *Id.* Attached to the financial documentation was a letter from the director of the U.S. Numismatic Trading at Blanchard and Co., one of the nation's largest retailers of U.S. coins, attesting to the wholesale quick sale value of the coins. Miller Remand Exh. 2. The liquidity of the oil leases was based on a representation by the Trustee of Inch Investments Ltd. that the Trust would be willing to purchase the oil leases at any time, subject to a discount of fifteen percent from their retail value, which was claimed as $400,000, less a $146,000 note. Miller Remand Exh. 1, pp. 8-9.

6. As of the July 12, 1985 certification date, Miller also had on file seventy-two Low Power television applications (LPTV), forty-six multi-channel MDS applications, and thirty cellular radio applications in markets 91 to 120. *S.I.D.*, 7 FCC Rcd at 1653-1655 ¶ ¶ 3, 7, 11. Although the record does not reflect the individualized costs of the separate applications, the ALJ was able to gauge undisputed overall cost figures for both the MDS and cellular applications by multiplying the estimated costs of one representative facility in each service by the number of pending applications. This formula produced cost figures of $7,958,000 and $60,000,000 for the MDS and cellular applications, respectively. *Id.* at 1654-1655 ¶ ¶ 7 and 11. Additionally, the parties submitted evidence that a single LPTV facility could be constructed and operated for $117,500, *see id.* at 1653 ¶ 3, which, utilizing the same formula as above, provides an overall LPTV cost of $8,460,000; or an aggregate of $76,418,000 for all of the applications. The FM broadcast applications subsequently filed, *i.e.*, in 1987 for Biltmore Forest, North Carolina, and Orange Beach, Alabama, are only incidental here, and will not be addressed further, because Miller's purported net liquid assets of $826,000 by 1987 were clearly sufficient, if excluding the LPTV, MDS, and cellular applications, to cover Miller's "worst cost scenario" for all three FM facilities. *See* Miller Remand Exh. 1, pp. 6-7; *S.I.D.*, 7 FCC Rcd at 1655-1656 ¶ ¶ 16-18.

7. Miller claims that, prior to the filing of the Gulf Breeze application, he had made arrangements with John R. Miller and wife (J.R. Miller) (no relation to the applicant) to fund the LPTV, MDS, and cellular facilities, which relieved him of any personal financial obligations for those applications. J.R. Miller's net worth was represented as having been in excess of $15,000,000. Miller Remand Exh. 1, Attach. A. A Memorandum of Agreement between Miller and wife on one hand, and the J. R. Millers on the other, dated July 3, 1984, was placed in the record, but does not explicitly set forth any provision relating to the construction and inaugural operation costs of the pending applications. Essentially, the memorandum provided that the parties would form two companies, M&M Communications, Inc., (M&M) and Miller Communications, Inc. (Miller Communications) as applicants for the LPTV, MDS, and cellular facilities. Miller and his wife were to hold fifty-one percent of M&M and fifty percent of Miller Communications, while the J.R. Millers acquired the rest of the stock ownership. Breeze Remand Exh. 2, pp. 1-4. The applications for the LPTV and MDS facilities had already been filed by Miller prior to the agreement, primarily under the applicant name M.D.S. of Monroe, Inc., and the agreement called for that entity to assign its applications to M&M. *Id.* Miller Communications was contemplated to be the applicant for the cellular facilities, and those applications were filed after the company was formed. *Id.*

8. Although the memorandum is silent regarding construction costs, Miller testified that he had an oral agreement with J.R. Miller, whereby the latter would provide all of the LPTV funding for construction and operation if their applications were selected in FCC lotteries. Miller Remand Exh. 1, pp. 1-3. He further stated that the MDS applications' construction and operation costs were to be funded by the Barnett Bank of Pensacola, Florida, principally, or by J.R. Miller, if necessary; and that such costs for the cellular facilities were to be funded by various bank commitments which accompanied the cellular applications. *Id.* J.R. Miller, in turn, testified that the essence of their agreement was that he would make a capital contribution for his approximately one-half interests in both companies and that he would fund or arrange funding for the construction and operation of the stations they "chose to build." Jt. Stipulation 1, p. 2. He acknowledged that, had they received grants of all of the MDS applications, he would not have contributed anything in the range of the roughly $8,000,000 shown in the applications to build those systems or obligated himself to put in even $2,000,000 for the LPTVs unless they found that the first few LPTV stations they built were successful. *Id.* at 3. No effort was made to prove the financial sufficiency of the individual bank letters for the MDS and cellular facilities, which letters, in most part, were not submitted into the record. *I.D.*, at 1654 ¶ 9.

9. J.R. Miller further testified that he was a director of the Bank of Mobile at Mobile, Alabama, one of the banks that gave a loan commitment letter to Miller Communications, *i.e.*, for a cellular facility at Binghamton, New York, and that the bank could not have totally funded the facility (for $2.5 million), without exceeding the bank's lending limit. Jt. Stipulation 1, p. 3. He stated, however, that it was always the applicant's choice whether or not the station(s)

would be built. *Id.* at 2. The Binghamton facility was in fact subsequently constructed and assigned to a purchaser, yielding $3,250,660 in cash to the applicant, fifty percent of which went to Miller. Miller Remand Exh. 1, p. 6. J.R. Miller also noted that the funding of the LPTV stations actually constructed, was provided by the buyers of the stations and that other permits were allowed to lapse. Jt. Stipulation 1, p. 8.

10. The ALJ resolved the issue against Miller. Basing his conclusion on J.R. Miller's testimony, the ALJ found that neither Miller nor J.R. Miller committed himself, individually or collectively, to meet the costs of constructing and operating all of the proposed facilities. *S.I.D.*, at 1654 ¶ 6. He further found that they never had any idea of how many of the stations they would build. *Id.* Thus, he concluded that, as of the July 12, 1985 date of certification, Miller lacked the financial wherewithal to meet all of his obligations to the many FCC applications pending at that time; that Miller never sought subsequently to amend his Gulf Breeze application to show he was financially qualified; and that Miller's ability to meet the costs of projects currently pending before the Commission is not relevant because he was clearly financially unqualified for a significant period of time after the filing of the Gulf Breeze application. *Id.* at 1657 ¶ 22. In this latter regard, the *S.I.D.*, at 1655-1656 ¶ 18, reports that Miller's current net liquid assets are $2,685,987; and Miller represents that he has no potential current financial obligation, with the exception of the Biltmore Forest application. Miller Remand Exh. 1, p. 3. That application was denied in 1991, but is pending on appeal. *Id.*

11. In excepting to the disqualification, Miller initially reiterates the argument made before the ALJ that he arranged to finance the facilities from sources other than his own funds, and that, to the extent the source of funds was a lending institution, he was never required to provide a personal guarantee or to pledge his assets as collateral. He denies that he was under any obligation to amend his Gulf Breeze application, because his financial position has improved over the course of the pendency of this application. Miller further contends that the Commission cannot impose involuntarily payment obligations on principals of applicants merely because they own interests in companies seeking a license and that the Commission, in any event, abolished financial qualifications for LPTV applicants. He suggests that any financial standard implicating a lottery mechanism should factor in the laws of chance, and that the Commission only look at current financial qualifications.

12. *DISCUSSION.* The Commission requires that broadcast applicants certifying to their financial qualifications have reasonable assurance of sufficient net liquid assets on hand or sufficient funds available from committed sources to construct and operate the requested facility for three months without revenue. *See Certification of Financial Qualifications,* 2 FCC Rcd 2122 (1987), and cases cited therein; *Scioto Broadcasters,Limited Partnership,* 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990) (subsequent history omitted). Subsumed within that standard is a requirement that an applicant proposing to meet costs from personal resources ascertain its total outstanding financial commitments before certifying that it is financially qualified. *Cf. A.P. Walter, Jr.,* 6 FCC Rcd 875, 877 ¶ 10 (Rev. Bd. 1991); *see also Northampton Media Associates,* 4 FCC Rcd 5517, 5518 (1989) (applicant may not certify its financial qualifica'ions and then arrange financing) (subsequent history omitted). The Commission has previously held that broadcast applicants with multiple applications pending before the Commission must be able to demonstrate adequate financial resources to construct and operate *all* proposed facilities. *See, e.g., Texas Communications Limited Partnership,* 5 FCC Rcd 5876, 5878 ¶ 11 (Rev. Bd. 1990) and cases cited therein (subsequent history omitted).

13. Here, the record establishes that Miller failed to meet his burden of proof showing that he had secured ample financing for all of his pending applications prior to certification. Although it is beyond the scope of this proceeding to rule on the financial qualifications of applications elsewhere, the applicant here bore the burden of showing that he was able to meet all his other outstanding financial commitments and the present broadcast financial proposal. *See Aspen FM, Inc.*, 6 FCC Rcd 1602, 1603 ¶ 9 (1991). That burden was not met. The purported source of financing, J.R. Miller, candidly acknowledged that he never obligated himself financially with respect to all applications they had pending. Moreover, as noted by the ALJ, neither Miller nor J.R. Miller ever calculated the total costs associated with all the applications, instead arrogating to themselves the choice of which facilities to build if granted. Although Miller claims to have successfully discharged his personal financial responsibility for the applications, he was the majority stockholder in the LPTV and MDS applicants and a fifty percent owner of the cellular applicants. Furthermore, there is evidence that Miller represented in at least one of the LPTV applications that his personal funds were the basis for the original financial certification, prior to the purported oral financing agreement with J.R. Miller. Breeze Remand Exh. 1. Thus, we perceive no error in the ALJ's finding that Miller failed to show he was financially qualified at the time of the certification.

14. Nor was it error on the ALJ's part to conclude that Miller's current financial posture is irrelevant. *See Aspen FM,* 6 FCC Rcd at 1603 ¶ ¶ 11-13 ("initial financial qualifications [are] a critical ingredient in a good cause showing for amendments, and in the absence of a demonstration by the applicant that it had reasonable assurance of financing at the time of certification, subsequent petitions to amend financial proposals have been disallowed"). The Commission explained in *Aspen* that its pre-1981 policy of permitting applicants to remove fatal deficiencies in their financial proposals by subsequent amendments led to serious abuses with the advent of the certification procedure because applicants were certifying to their financial qualifications without any basis or justification and then later formulating a financial proposal.

15. As for Miller's other exceptions, we previously addressed in detail the financial standards for LPTV and cellular applications, *see* 5 FCC Rcd at 6366-6367 ¶ ¶ 10-11. His exception, which explicitly recognizes that the Board's prior pronouncement on the matter differs from his view of the law, *see* Miller's March 27, 1992 Br. at 18, is raised merely for purposes of subsequent appeal. Additionally, we reject Miller's suggestion that the laws of probabilities be taken into account in evaluating financial qualifications where the lottery mechanism is implicated. Miller has not shown that the Commission has ever followed such a policy, and in the absence of such a showing, we will not adopt such a course of action on our own. *See Horne Industries, Inc.*, 91 FCC 2d 1193, 1194 (Rev. Bd. 1982) ("the board has never been authorized to make new policy or change old policy'"). Finally, Miller's assertion

that he never had to amend his Gulf Breeze application financial showing because his net worth continued to grow is not pertinent in light of our discussion above.

BREEZE BROADCASTING COMPANY, INC.

16. Breeze is a Florida limited partnership composed of two general partners, William H. and Patsy T. Phillips, and two limited partners, Houston L. and Voncile R. Pearce. *I.D.*, at 26 ¶ 6. Each of the principals holds a twenty-five percent interest in the partnership. *Id.* William Phillips proposes to work full time as general manager as does his wife as station manager and program director. *Id* . at 27 ¶ ¶ 7-10. William Phillips is a part owner of an FM station in Alabama but has pledged to divest that interest in the event that the Breeze application is granted. *Id.* at ¶ 14. The limited partners have ownership interests in seven broadcast stations. *Id.* at ¶ 16.

17. In awarding Breeze one hundred percent quantitative integration credit, the ALJ rejected arguments by Breeze's opponents that the Pearces' equity interests are attributable to the applicant both because of deficiencies in the limited partnership agreement that allows the limited partners to influence and control the applicant and because the Pearces' actions in the prosecution of the application allegedly violated the "no material involvement" safeguards necessary to exempt passive owners. With respect the first contention, the ALJ found that any control rights conferred on the Pearces by the agreement were inserted to "ensure that the original equity interests remain the same except by mutual agreement of all of the partners." *Id.* at 28 ¶ 23. As for the so-called active behavior, he found that the Pearces have had only limited contacts with the Phillips and that their participation in settlement negotiations faulted by the excepters was limited to contact with Phillips after he believed he had an agreement in hand. As further evidence that the limited partners would be passive, the ALJ referred to testimony that the Pearces live 300 miles from Gulf Breeze, are involved in other businesses or broadcast ventures, and have not had any input on the normal everyday decisions relating to the prosecution of the application. The exceptions reiterate the arguments made before the ALJ.

18. *DISCUSSION.* The Commission generally disregards the ownership interests of passive owners when computing an applicant's quantitative integration credit because passive investors lack authority to control the licensee, and their "integration or lack of integration is inconsequential." *Anax Broadcasting,* 87 FCC 2d 483, 488 (1981). Where, however, the nominally active principals are insufficiently insulated from influence or control by the passive owners, the equity interests of the latter are factored into the integration analysis, resulting in at minimum a diminution of the applicant's quantitative percentage because those owners are not integrated. *See Doylan Forney,* 5 FCC Rcd 5423 (1990), *aff'd by judgment sub nom. Maricopa Media, Inc. v. FCC,* 951 F.2d 1324 (D.C. Cir. 1991); *see also Evergreen Broadcasting Co.,* 6 FCC Rcd 5599, 5600 (1991). Complete deference by the nominally active principals to the passive owners requires a complete discounting of the applicant's quantitative integration proposal. *Liberty Productions, A Limited Partnership,* 7 FCC Rcd 7581, 7585 § 32 (1992); *see also Royce International Broadcasting,* 5 FCC Rcd 7063, 7064 ¶ 10 (1990) (no credit where applicant has left a fundamental uncertainty about the true nature of its organizational structure).

19. Here, with the exception of two points, we are in agreement with the ALJ's treatment and rejection of the arguments raised by Breeze's opponents. The first point of disagreement, however, mandates that the interests of the Pearces be attributed to the applicant. Article V ¶ 4 of the limited partnership agreement provides (emphasis added):

> If, under the management of the General Partners, the business of the partnership is unprofitable on a cash flow basis for any three consecutive calendar quarters after the first two years after the initiation of broadcasting by any station(s), *the Limited Partners, acting unanimously, shall have the right to require the conversion of the partnership into a corporation ... in which each partner would hold a number of shares in the same proportion as his or her Capital Account bears to the sum of the Capital Accounts.*

Miller Exh. 6, p. 7. No evidence was adduced demonstrating that the stock received by the limited partners would be non-voting stock. We have previously held that, "under the comparative issue the Commission will take cognizance of conversion rights adverse to the interests of an applicant in the absence of evidence that the convertible interests will not be exercised." *Signal Ministries, Inc.,* 104 FCC 2d 1481, 1490 (Rev. Bd. 1986), *review denied,* 2 FCC Rcd 1259 (1987), *aff'd by judgment sub nom. Adelphi Broadcasting Corp. v. FCC,* 838 F.2d 571 (D.C. Cir. 1988). We substantially diminished the integration proposals of two integrated stockholders in *Signal Ministries* where a one percent non-integrated stockholder retained a right under a stock transfer restriction agreement to repurchase up to two-thirds of the formers' stock after a two year period. *Id.* at 1497 n.16. Breeze would have us infer that the stock acquired by the Pearces would be non-voting stock if the limited partners elected to convert the applicant into a corporation. Its argument must fail in the absence of probative evidence on the matter, because the burden of establishing that the stock would be non-voting or that the conversion provision would not be exercised was on Breeze. *See Charisma Broadcasting Corp.,* FCC 93-563, released February 9, 1993 at ¶ 16 (applicant has burden of establishing the credibility of its ownership structure); *Emision De Radio Balmeseda, Inc.,* 7 FCC Rcd 3852, 3852-3853 ¶ ¶ 6-8 (Rev. Bd. 1992) (credit denied where applicant failed to meet legal burden of showing unlikelihood that option by non-voting stockholders to force sale of voting stock would be exercised). Those burdens were not met here. *Signal Ministries* is controlling.

20. The other troubling provision of the limited partnership agreement is Art. III ¶ 2, which permits the limited partners to determine the general partners' salaries if the salaries exceed their previous employment. Miller Exh. 6, p. 3. In light of the spiraling costs of salaries, it is difficult to conceive that this provision would not be invoked at some future time thus providing a mechanism for the limited partners to influence the applicant; however, in view of our disposition above, we need not decide whether that provision, standing alone, would require attribution. Breeze is entitled to only fifty percent quantitative integration for the Phillips' equity interests, *see Liberty Productions,* 7 FCC Rcd at 7585 ¶ 32 (partial credit warranted where nominally active owners share managerial authority with purportedly passive owners). Additionally, Breeze receives a decisive diversification demerit based on the attribution of the media interests of the limited partners to

the applicant for diversification purposes. *See Radio Laredo, Inc.*, 87 FCC 2d 353, 354, 362 ¶ 2, n.14 (Rev. Bd. 1981) (subsequent history omitted) (media interests of proposed general manager who held an option to acquire a twenty percent interest in the applicant attributed to applicant under the diversification criterion where there was no evidence that the option holder would not exercise his option).

GULF BREEZE BROADCASTING COMPANY

21. Gulf Breeze filed its application as a general partnership, comprised of Galen D. Castlebury, a forty percent partner; his wife Helen, a forty percent partner; and Nadine L. Meade, a twenty percent partner. *I.D.*, at 31 ¶ 54. The partnership agreement included a notation that the partners intended to form a corporation at some later time "with the above points in mind." *Id.* at 32 ¶ 65. All three principals proposed to work full time at the station in management positions: Galen Castlebury as general manager; his wife as station manager; and Meade as sales director. *Id.*, at 33 ¶ 69. The ALJ credited the integration proposals of Galen Castlebury and Meade and awarded the applicant sixty percent quantitative credit, but discounted Ms. Castlebury's proposed role on grounds that she would defer to her husband and that her description of her duties was too vague to warrant integration credit. *Id.* at 31-32 ¶ ¶ 48-50, 69. Gulf Breeze's exceptions challenging the ALJ's ruling denying credit for Ms. Castlebury's proposed role at the station are no longer viable because of the subsequent report, para. 2, *supra*, that Ms. Castlebury will not be able to effectuate her proposal; and thus, the applicant would not be entitled to credit for her proposed participation. *See generally V.O.B. Incorporated.* Gulf Breeze and its principals have no cognizable interest in any medium of mass communications. *I.D.*, at 32-33 ¶ ¶ 64, 72.

22. At the outset, we perceive no basis for discounting the integration proposals of Galen Castlebury and Nadine Meade. Breeze would deny them credit because of the substantial amount of time Galen Castlebury will initially spend on engineering and because he has in his description of past broadcast experience indicated that he was a full-time general manager when he was concurrently serving as Country Commissioner. Breeze would also deny credit for Meade, as unlikely of fulfillment, because she is a successful broker with a real estate agency. However, their respective proposed roles as general manager and sales manager are explicitly recognized as managerial by the Commission's *Policy Statement*, 1 FCC 2d at 395. No evidence was adduced that Ms. Meade would not honor her commitment to the station. She testified that she intends to work at the station, Tr. 658, that she had informed her sales office she would be working at the station if their application were granted, and that she would place her broker's license in the inactive status, thus prohibiting her from selling real estate on the side. Tr. 679-681. Speculation that she will not work at the station because she has been a successful salesperson is not a legal basis for discounting the integration proposal. *See Goodlettsville Broadcasting Company, Inc.*, 8 FCC Rcd at 61 ¶ 17. Nor will we reject Galen Castlebury's proposal because his duties may include nonmanagerial functions. *See Sunbelt, Limited Partnership*, FCC 93-52, released February 3, 1993, at n.10, and cases cited therein. Similarly, his prior experience as County Commissioner for some of the years he owned and managed WMPT provides no basis for discounting his proposal. He testified that he had no future political plans. Tr. 642.

23. Nor is Gulf Breeze's intention to form a corporation at a later date fatal to an award of integration credit as argued by Breeze and Miller. Castlebury testified that the change was proposed to limit the principals' liability, Tr. 627, but their voting rights in a corporation would be in the same proportion as now held in the partnership. Tr. 627, 741-742. Miller's reliance on *Scott and Davis Enterprises, Inc.*, 54 RR 2d 868 (1983) and *Marr Broadcasting Co., Inc.*, 2 FCC Rcd 3466 (Rev. Bd. 1987) for rejecting credit is misplaced. Those cases are inapposite because they relate to settlement agreements whereby the grantee effectively functioned as a conduit for the construction permit to go to a third party whose qualifications the Commission had not been passed upon. Miller would also limit the credit Castlebury may receive to thirty three and one third percent, alleging that the partnership agreement voting percentage was silent on the B cut-off date, but we need not reach this argument because it is non-decisional here. *See* para. 25, *infra*. Gulf Breeze is entitled to quantitative integration credit for Galen Castlebury and Meade.

24. The more pressing question presented here concerns the ALJ's denial of a petition to enlarge issues seeking misrepresentation issues against Gulf Breeze based on alleged inconsistencies between the testimony of Galen Castlebury and his wife, *see Memorandum Order and Opinion*, FCC 88M-3787, released November 8, 1988. Subsequently, the ALJ indicated in the *I.D.* that Galen Castlebury's testimony was troubling but not sufficiently egregious to warrant further inquiry as to his candor, or to merit Gulf Breeze's disqualification. *I.D.*, at 33 ¶ ¶ 69, 71. Breeze especially challenges the ALJ's resolution of this matter. Maranatha also argues that the ALJ's ruling denying the misrepresentation or lack of candor issue and subsequent findings are inconsistent in tenor if not in result. It does appear that the ALJ, who, unlike the Board, had an opportunity to observe the witnesses' testimony, ultimately subscribed to Breeze's allegations of misrepresentation and lack of candor, notwithstanding the denial of the requested issue. Thus, he finds:

> The change in her job description from Office Manager to Station Manager was a clear attempt to reinforce a claim for a management role at the Gulf Breeze facility by exaggerating her past broadcast experience. Mr. Castlebury's testimony that he introduced her at station WMPT as the Station Manager when, by Mrs. Castlebury's own admission, she did little else than answer the phone, is an obvious attempt to inflate Mrs. Castlebury's position at that station in order to make her proposal of a management role at the Gulf Breeze facility more credible. The conclusion is inescapable that there has been a concerted effort on the part of the applicant to claim a more significant role for Mrs. Castlebury then she will actually fill.

5 FCC Rcd at 33 ¶ 69. Elsewhere, he states:

> The inconsistencies between Mr. Castlebury's testimony and that of his wife as to her role at station WMPT, South Williamsport, Pennsylvania and her title, if any, and their reason for moving to Florida;

> Mr. Castlebury testified that it was to acquire another broadcast facility whereas Mrs. Castlebury's indicated that they intended to retire (Tr. 619, 739); and Mr. Castlebury's testimony as to the date an amendment was prepared (Tr.570) are troublesome since they draw into question the Castleburys' forthrightness.

Id. at ¶ 71. In light of these specific findings, we have no choice but to remand the proceeding. The Commission is always concerned "with a broadcast applicant's propensity to be truthful in dealing with the Commission." *San Joaquin Television Improvement Corp.*, 2 FCC Rcd 7004, 7005 ¶ 8 (1987). Moreover, "a determination of a willful intent to deceive must be preceded by the timely designation of a disqualifying issue, and tried with a full and fair appreciation of the critical implications of such an issue." *Pleasure Island Broadcasting, Inc.*, 6 FCC Rcd 4163, 4164 ¶ 10 (Rev. Bd. 1991). In *Frank Digesu, Sr.*, 7 FCC Rcd 5459 (1992), the Commission remanded a proceeding to ascertain whether an applicant falsely testified about its principal's past broadcast experience and claimed full-time participation. And in *WCVQ, Inc.*, 5 FCC Rcd 3824 (1990), it remanded a proceeding to test the applicant's claim of enhancement credit for past broadcast experience. Those cases, which were decided after the *I.D.* in this case, mandate a similar remand here.

25. *Summation.* Miller is disqualified on the financial qualifications issue. Maranatha seeks no integration credit and, in addition, has been assessed a diversification demerit. Breeze is entitled to fifty percent integration credit but it is also subject to a decisional diversification demerit. Thus, Gulf Breeze, which is entitled to, at minimum, fifty three and one third percent integration credit, *see* para. 23, above, and has no diversification demerit, would easily prevail comparatively over the qualified applicants even when factoring in the very slight coverage preference awarded by the ALJ to Breeze, *see Naguabo Broadcasting Co.*, 7 FCC Rcd 1696 (1992); *Rancho Mirage Radio*, 7 FCC Rcd 480, 484 n.4 (Rev. Bd. 1992) (subsequent history omitted), in the absence of an adverse finding under a misrepresentation and lack of candor issue.

26. *Miscellaneous.* The Board also has before it a Motion to Reopen the Record and Enlarge Issues, filed August 6, 1992, by Maranatha seeking a Section 1.65 reporting issue against Gulf Breeze; an exception by Miller requesting a financial qualifications issue against Breeze; and a motion to certify the proceeding to the Commission, filed by Miller, based in part upon his disagreement with the Board on the Commission's financial standards regarding LPTV, MDS, and cellular applications.

27. We will deny Maranatha's motion to enlarge. Briefly, it urges an issue predicated on Gulf Breeze's failure to timely report Commission action cancelling a construction permit issued to Galen and Helen Castlebury, d/b/a Pensacola Bay Broadcasting Company for an AM facility in Pensacola, Florida. However, Gulf Breeze reported prior to designation the filing of the application, a simultaneous divestiture pledge in the event that the Gulf Breeze application was granted, and the subsequent grant of the non-contested application. Gulf Breeze amendment of March 12, 1987; amendment of May 26, 1989. Additionally, Gulf Breeze submits the declaration of Galen Castlebury under penalty of perjury averring that he received the Commission letter announcing the Commission action at the same time as he received the motion to enlarge issues. Castlebury explained that in light of the divestiture pledge, the station, if constructed, would have to be sold in the current depressed economic market, but that he fully intends to construct the FM station, which would be operating in a far healthier economic climate. Based on the foregoing, we perceive no legal basis for an issue. *See Richardson Broadcast Group*, 7 FCC Rcd at 1587-1588 ¶ 26 (reporting issue warranted only where there is an intent to conceal facts from the Commission or there is a pattern of repeated violations or other factors reflecting significant carelessness or inattentiveness). Nor will we grant Miller's exception to add a financial issue against Breeze. The ALJ found that the motion to enlarge did not contain specific allegations of fact to support an issue as required by Section 1.229(d) of the Commission's Rules. We find no error after reviewing the motion.

28. ACCORDINGLY, IT IS ORDERED, That this proceeding IS REMANDED to the Presiding Officer for further hearing and the preparation of a *Further Supplemental Initial Decision* on the following issue:

> To determine whether Galen Castlebury made misrepresentations or lacked candor before the Commission in describing his wife's past broadcast experience and the circumstances surrounding the preparation of the Gulf Breeze partnership agreement and amendment thereto, and in light of the evidence adduced under this issue, the effect thereof on Gulf Breeze's qualifications to be a Commission licensee.

29. IT IS FURTHER ORDERED, That the petitions for leave to amend, filed by Gulf Breeze Broadcasting Company on June 5, and supplemented August 6, August 6, and August 21, 1992, respectively, ARE GRANTED, and the amendments ARE ACCEPTED; that the petitions for leave to file reply to comments on petition for leave to amend and to accept late filed opposition, filed August 6 and 21, 1992 by Gulf Breeze Broadcasting Company ARE GRANTED; that the petitions for leave to amend filed by Breeze Broadcasting Company, Ltd. on August 26, November 12, and December 2, 1992, and on February 3, 1993, respectively, ARE GRANTED, and the amendments ARE ACCEPTED; that the motion to certify proceeding to the Commission, filed March 27, 1992 by J. McCarthy Miller IS DENIED; and that the motion to reopen the record and enlarge issues, filed August 6, 1992 by Maranatha Broadcasting Company, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-48

In the Matter of

Policies and Rules Concerning
Children's Television Programming

Revision of Programming Policies
for Television Broadcast Stations

NOTICE OF INQUIRY

Adopted: March 2, 1993; Released: March 2, 1993

Comment Date: April 23, 1993
Reply Date: May 24, 1993

By the Commission: Commissioner Marshall not participating.

1. The Commission adopted policies and rules implementing the Children's Television Act of 1990[1] (CTA) on April 9, 1991. *Report and Order*, 6 FCC Rcd 2111, *recon. granted in part*, 6 FCC Rcd 5093 (1991). The CTA and our implementing rules impose both an affirmative children's programming obligation on broadcasters and restrict the amount of commercial time that may be placed in children's programming. We have now reviewed more than 320 television license renewal applications subject to the CTA's requirements. The majority of these applications demonstrated adequate efforts to meet the programming needs of children given that very limited portions of the applicants' license terms were subject to the CTA.[2] At the same time, however, we want to ensure that broadcasters having significantly longer periods remaining in their license terms be aware of Congress' intent to expand and improve the level of educational and informational programming directed at children. Accordingly, we initiate this proceeding to seek comment on whether and in what manner our rules and policies might be revised to more clearly identify the levels and types of programming necessary in the long term to adequately serve the educational and informational needs of children.

2. **Background.** The CTA's objectives were to increase the amount of educational and informational broadcast television programming available to children and to protect children from over-commercialization of programming.[3] A review of the CTA's legislative history reflects Congressional concern as to the amount and type of children's television programming and the limited time periods during which children's programming is broadcast. Congress explained that time periods designated for "children's programming" are often filled with reruns of adult or family comedy, variety, or dramatic programs.[4] Congress noted that, on the average, each of the networks air an after-school special one day a month during the school year and that independent stations tend to offer programs to children during the week that consist of animated cartoons, often with commercial products associated with them.[5]

3. Accordingly, Congress directed the Commission to review at renewal, among other things, whether television broadcasters have served the educational and informational needs of children.[6] The legislative history of the CTA suggests that programming that furthers children's positive development in any way, including serving their cognitive/intellectual or social/emotional needs, could qualify as part of broadcasters' efforts to meet this obligation. Examples of such material were given and included programs like "Fat Albert and the Cosby Kids", which dealt in a meaningful way for children with issues such as drugs, divorce, friendship and child abuse.[7] For additional examples see the Commission's *Report and Order, supra*, at para. 26.

4. Pursuant to our rules implementing the objectives of the CTA,[8] starting on October 1, 1991, television station licensees were required to respond to the educational and informational needs of children 16 years of age and under through their stations' overall programming, including programming specifically designed to serve such needs. In accordance with the CTA's legislative history, however, no minimum amount of such programming has been prescribed. Nor has any programming that does, in fact, serve children's educational and informational needs been excluded from consideration in demonstrating compliance with the CTA. Short segment programming, including vignettes and public service announcements, live action, animated and general audience programs, whether network, syndicated or locally produced, can all be relied upon as contributing to a licensee's programming efforts on behalf of children. Thus, as Congress intended, television licensees enjoy substantial discretion both in determining whether a particular program qualifies as educational and informational and in fixing the level or amount of children's programming that it will air. Plainly, however, that discretion is not unlimited. We have, for example, stated that some standard-length programs specifically designed to serve the educational and informational needs of children must be aired to fulfill a licensee's obligations under the

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[1] Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. Sections 303a, 303b, 394.

[2] Television license renewal applications filed since February 1992 have been reviewed under the CTA criteria. To date, therefore, renewal applicants have, at most, had one year of their five year license terms subject to CTA requirements.

[3] Children's Television Act of 1989, Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 227, 101st Cong., 1st Sess. 22 (1989) (*Senate Report*).

[4] *Senate Report* at 8.

[5] *Id.*

[6] For purposes of the programming obligations imposed by the CTA, the Commission has defined children as individuals aged 16 or under.

[7] *See Senate Report* at 7.

[8] The rules are 47 C.F.R. Sections 73.520 and 73.671.

CTA.[9] Moreover, it seems clear that Congress intended, in adopting the CTA, to increase the amount of educational and informational programming aimed expressly at the child audience.[10]

5. **Discussion.** At the outset, we acknowledge the substantial difficulty inherent in adequately particularizing broadcasters' children's programming obligations while also affording licensees the discretion that Congress intended to reserve to them in meeting that obligation. To this point, consistent with Congress' express preference for avoiding quantitative standards and for relying on licensee judgment in meeting children's programming needs, we have consistently favored statements of purpose over specific regulatory requirements. We continue to believe that licensees must, for the most part, themselves define the appropriate scope of their service to children in their communities. At the same time, of course, we are obliged to review the adequacy of that service at renewal. In light of our experience in reviewing renewal applications that are subject to the CTA's programming requirements and in evaluating the efforts licensees have documented to meet those requirements, we believe that refinement of our implementation of the CTA may be warranted.

6. For example, an informal comparison of the children's television programming listed in recently filed renewal application exhibits with Congressional findings set forth in the CTA's legislative history, suggests little change in available programming that addresses the needs of the child audience.[11] The number of hours and time slots devoted to children's programming do not appear to have substantially changed. Further, with few exceptions, the "educational and informational" programming broadcast appears to be those same few programs set forth in the legislative history for illustrative purposes. Moreover, while practically all licensees filing renewal applications in the current renewal cycle have identified some regularly scheduled, standard-length children's programming aired during their license terms, the amount of such programming is, in some cases, very limited.[12] Many of these licensees place substantial reliance on short-segment vignettes and public service announcements to satisfy their CTA obligations.[13] Finally, some licensees are proffering such animated programs as "The Flintstones" and "G.I. Joe" as informational and educational, asserting that such programs include a variety of generalized pro-social themes.

7. We do not believe that this level of performance is, in the long term, consistent with the objectives underlying the CTA. We wish to make clear that we do not attribute the programming performance suggested by our renewal experience to date to any unwillingness to comply or any intentional disregard for their programming responsibilities on the part of broadcasters. Rather, we believe that broadcasters may remain uncertain as to the scope of their programming obligations and that this uncertainty may largely explain the apparent lack of growth in children's programming. Indeed, where the CTA has imposed specific, palpable performance standards -- as it has with respect to commercial time limits in children's programming -- broadcasters' compliance rate appears to be quite high.[14] We conclude that both the Commission and licensees might benefit from further efforts to exemplify and define the CTA's programming requirements. Accordingly, we believe it is appropriate to again address some of the more difficult issues raised by the statute and our rules and to inquire how we might better guide broadcasters in discharging their children's programming obligations. We seek comments, therefore, on the broad range of implementation and compliance issues suggested by the foregoing discussion as well as on the following, specific preliminary views.

8. First, we believe that broadcasters should place their primary reliance in establishing compliance with the CTA on standard-length programming that is specifically designed to serve the educational and informational needs of children, and should accord short-segment programming secondary importance in this regard. Standard-length programming is scheduled and therefore available to the child audience at predictable times. This is especially important to parents who may be more directly involved in screening the television viewing of younger children. Second, to avoid definitional problems, we believe it may be appropriate to specify that the primary objective of qualifying "core" children's programming should be educational and informational, with entertainment as a secondary goal. In other words, we believe broadcasters should focus on programming that has as its *explicit* purpose service to the educational and informational needs of children, with the implicit purpose of entertainment, rather than the converse.[15] This may help to avoid potentially misplaced reli-

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[9] *Children's Television Reconsideration Order*, 6 FCC Rcd 5093, 5101 (1991).

[10] *See, e.g., Senate Report* at 1.

[11] We acknowledge the possibility that program suppliers may not yet have made available significant amounts of standard-length programming expressly directed to the educational and informational needs of children because the obligation to air it and the demand generated by that obligation are relatively recent developments. To the extent that this "supply shortage" explains the slow growth to date in "core" children's programming by broadcasters, we seek specific comment on whether the supply of such "core" programming will resolve itself as long as broadcasters clearly understand and express their children's programming needs.

[12] "Standard-length" programs are generally understood to be at least one half-hour long. To date, some licensees filing renewal applications in the current renewal cycle have identified as little as one such standard-length "core" children's program aired on a weekly basis.

[13] Other activities in support of children's programming, including support for other stations' broadcast efforts or non-broadcast activities that assist or supplement broadcast material, may also be relied upon in meeting a licensee's children's programming obligations.

[14] Commission review of advertising practices in children's programming have so far found compliance rates exceeding 90%. For example, in January 1992, the Commission conducted field audits of some 141 television stations and 27 cable systems to determine compliance with the commercial time restrictions. All but 10 of the stations or systems sampled clearly complied with the limitations, a better than 94% overall compliance rate. More recently, the Commission conducted a further audit of commercial time use in children's programming by television stations and cable systems, the results of which are not yet final. Preliminary figures, however, again suggest that overall compliance rates will exceed 90%.

[15] This clarification should help licensees and the Commission to avoid the difficult and subjective task of distinguishing the relative educational merits of some programs identified approvingly in the legislative history (*e.g.*, Pee Wee's Playhouse, The

ance by licensees on entertainment programming that is asserted to be informational or educational based principally on a "wrap-around" pro-social message.[16]

9. We also seek comment on whether, to provide clearer guidance to licensees and to facilitate renewal review by the Commission, we should adopt staff processing guidelines specifying an amount and type of children's programming that would permit staff grant of a license renewal application meeting the guideline, while applications not satisfying the processing criteria would be subject to further review. If so, what should such guidelines be (*e.g.*, one hour per week or one hour during the week and one hour during the weekend of standard-length, informational and educational programming)? How should such a standard be affected by the amount, scheduling and quality of the standard-length material that is aired or by the broadcast of other programming that Congress acknowledged could contribute to meeting children's needs, but that does so indirectly (*e.g.*, family programming or children's entertainment programming that carries a secondary educational, ethical or informational message)? Would such an approach violate Congress' expressed intention to avoid a minimum quantitative programming test? In this latter regard, it should be noted that failure to meet the guideline would not necessarily result in any sanction or non-renewal; rather it would determine the intensity of Commission scrutiny. On the other hand, we have acknowledged, in other contexts, that processing guidelines in the renewal area can take on the force of a rule, at least in the perception of licensees.[17]

10. We seek comment on the foregoing matters and on any related issues that may assist us in better implementing the requirements and underlying objectives of the Children's Television Act.

Procedural Matters

11. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 CFR Sections 1.415 and 1.419, interested parties may file comments on or before April 23, 1993, and reply comments on or before May 24, 1993. All relevant and timely comments will be considered by the Commission before taking further action in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comment and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

12. For further information concerning this Notice of Inquiry, contact Barbara A. Kreisman (202-632-6993), Mass Media Bureau, Video Services Division, Federal Communications Commission, Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Smurfs, Winnie the Pooh, *see Senate Report* at 7-8) and those listed in some renewal applications as educational (*e.g.*, The Flintstones or The Jetsons).

[16] "Wrap around" refers to the practice of inserting a pro-social message at the beginning and end of an "entertainment" program in an effort to make it qualify as "educational and informational." We do not suggest, of course, that entertainment programming with a secondary informational or educational message cannot contribute to a broadcaster's children's programming efforts. Such material cannot, however, satisfy the "core" standard-length programming element of the programming obligation imposed by the CTA.

[17] *See, e.g., Notice of Proposed Rulemaking* in MM Docket No. 83-313 (*Television Deregulation*), 94 FCC 2d 678, 696 (1983).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-10

In the Matter of

Provision of Access
for 800 Service

ORDER

Adopted: March 10, 1993; Released: March 11, 1993

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On July 10, 1992, Sprint Communications Company (Sprint) filed a Petition for Declaratory Ruling requesting that the Commission authorize the administrator of the Number Administration and Service Center (NASC) to make certain 800 traffic routing and "Responsible Organization" (RESPORG) changes to the Service Management System (SMS).[1] We now grant Sprint's petition in part and allow the NASC administrator, with appropriate written authorization, to make RESPORG changes to the SMS. However, we dismiss, without prejudice, all further requests in the petition.

II. BACKGROUND

2. 800 service is an interexchange service in which a subscriber agrees in advance to pay for all calls made to its 800 number from a specified area. The Bell Operating Companies (BOCs), along with the Independent Telephone Companies (ITCs), will soon implement a new "data base" system of 800 access. Under this data base system, local exchange carriers (LECs) will identify the 800 service provider for each 800 call by querying a regional data base (Service Control Point or SCP) that contains 800 service information associated with each 800 number. This 800 service information will be loaded into each SCP via the SMS, a centralized data base system. All 800 service records must be loaded into the SMS for downloading to the regional SCPs. In addition, all changes in 800 service records must be entered in the SMS. The NASC administers the 800 SMS. Currently, Bellcore is the administrator of the NASC although plans are under way to select an administrator to replace Bellcore.

3. Only one entity -- the "Responsible Organization" or "RESPORG" -- will be permitted to access each customer record in the SMS to make changes to that record.[2] With the implementation of 800 data base access, a customer's current 800 carrier will generally become that customer's RESPORG. In a recent order, we held that 800 service subscribers should be able to choose the RESPORG for their 800 service and that they should be able to designate any entity (including themselves) as RESPORG, provided that entity meets tariffed RESPORG eligibility criteria.[3] Having addressed the issue of who chooses the RESPORG and who can be a RESPORG, we now turn to the issue, posed in the Sprint petition, of how RESPORG changes will be effected.

III. SPRINT PETITION

4. According to Sprint, the RESPORG will often be the customer's current 800 service provider.[4] Thus, if the customer wants to change its RESPORG, or shift some or all of its traffic to another carrier, the RESPORG will receive advance notice of those changes. Sprint argues that this situation raises competitive concerns, in that it gives the RESPORG an opportunity to take "immediate and possibly questionable" measures to dissuade its customer from making the changes.[5] In particular, Sprint says that it is concerned that AT&T, which it says is the RESPORG for the majority of interstate 800 customers, will make Tariff 15 offerings to specific customers after being notified of their intention to shift traffic to another carrier.[6] This, says Sprint, would perpetuate historic barriers to entry in the 800 service market.[7] To prevent this from occurring, Sprint asks us to rule that the NASC administrator is authorized to make 800 traffic routing and RESPORG changes to SMS records in cases where such changes involve a carrier other than the current RESPORG.[8]

5. In its reply, Sprint clarifies that such use of the NASC administrator would be at the option of the new carrier, and that the costs associated with having the NASC administrator perform this function would be borne by the 800 service providers that avail themselves of this option.[9] It emphasizes that the NASC administrator would not be shouldering all of the responsibilities normally assumed by a RESPORG, and claims that its proposal would therefore not require substantial additional resources of the NASC administrator.[10]

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[1] As part of the same filing, Sprint also made a Request for Further Proceedings asking the Commission to initiate a rulemaking proceeding to determine an appropriate and acceptable structure and charter for parties responsible for administering and operating the NASC and SMS, as well as to develop and implement a set of 800 number administration guidelines. In an order released August 6, 1992, the Common Carrier Bureau denied, without prejudice, Sprint's request for a rulemaking proceeding. *See* 7 FCC Rcd 5197 (1992).

[2] We understand that Bellcore, which designed the SMS software, is studying software changes that would allow a "view-only" function so that a carrier that was not the RESPORG for a particular customer could access the customer's record in the SMS for viewing purposes only. Even after this capability is available, however, only the RESPORG will be able to make changes to the SMS record.

[3] *See* In the Matter of Provision of Access for 800 Services, CC Docket No. 86-10, FCC 93-84, released February 10, 1993 (hereinafter the "*CompTel Order*").

[4] Sprint Petition at 2.

[5] *Id.* at 3.

[6] *Id.* at 3-4, Reply at 3.

[7] Sprint Reply at 4.

[8] *Id.* at 1.

[9] *Id.* at 15-16.

[10] *Id.* at 16. For example, Sprint says that under its proposal, the NASC administrator would be limited to making traffic

6. The Ad Hoc Telecommunications Users Committee (Ad Hoc), Aeronautical Radio, Inc. (ARINC), and the Competitive Telecommunications Association (CompTel) support Sprint's proposal.[11] They argue that the inherent problems in relying on an 800 service provider to implement changes to the SMS that would route traffic away from its network to a competitor are readily apparent, and that allowing the NASC administrator to make such changes would enhance competition.[12]

7. The BOCs, AT&T, and Allnet oppose Sprint's petition. The BOCs and AT&T argue that Sprint's petition is premature. First, they claim that the concerns identified by Sprint may be resolved without regulatory intervention, particularly since the Carrier Liaison Committee's 800 Data Base Committee (800 Committee) is currently developing guidelines to ensure that SMS changes involving multiple carriers are properly coordinated and executed.[13] Second, the BOCs and AT&T assert that Sprint's concerns are hypothetical and that any "solution" -- if developed before operational experience is gained -- may be overly restrictive or not restrictive enough. AT&T asserts, further, that there is no reason, in any event, to assume that RESPORGs will not expeditiously make any service or RESPORG changes requested by a customer.[14] It claims that any refusal in this regard would be self-defeating, since it would alienate the customer and possibly invite legal action. AT&T also denies that the advance notice accorded RESPORGs raises competitive concerns. It argues that efforts to persuade customers to subscribe to a carrier's service are the "essence of competition," and that customers will benefit if advance notice stimulates such competition.[15]

8. Allnet argues that Sprint's proposal could create a conflict of interest. Allnet claims that so long as Bellcore operates the NASC, it would be improper to confer upon the NASC administrator any additional responsibilities that might provide it with access to the customer base of any RESPORG. The BOCs and MCI further argue that imposing additional duties on the NASC administrator might also increase operational costs.[16] Despite such concerns, MCI supports the Sprint petition only to the extent of allowing the NASC administrator to make simple RESPORG changes.[17] MCI contends that allowing the NASC administer to make such changes will address those situations with the greatest potential for competitive abuse and at the same time burden the NASC administrator only minimally.

IV. DISCUSSION

9. We now grant Sprint's petition in part. Specifically, we authorize the NASC administrator to make RESPORG changes, based on proper written authorization by users.[18] We dismiss without prejudice, however, Sprint's further request that the NASC administrator be authorized to make 800 traffic routing changes.

10. We conclude, first, that the NASC administrator should be available to make RESPORG changes. The public interest is not well served by a system requiring that an 800 service provider serving as RESPORG receive advance notice that a customer is, at a minimum, transferring its 800 account coordination to a third party -- often a competitor -- and quite possibly shifting most if not all of its 800 business to a competitor as well. Such changes obviously have particular competitive significance since they affect a customer's entire account and we find that advance notice confers an unfair market advantage on the incumbent carrier, who has a great incentive to resist them.[19] We conclude that a new RESPORG should have the ability to go to the NASC administrator, with written customer authorization, to change the identity of that customer's RESPORG.

11. We do not, however, grant Sprint's request that the NASC administrator be given authority to make traffic routing changes to a customer's record in the SMS. As set forth below, we find that the record does not contain sufficient information about the benefits or costs of this request. In addition, we believe that any possible need for this action is mitigated by our decision above to allow the NASC to make RESPORG changes, as well as by our decision in the *CompTel Order*.

12. We note, first, that the record does not indicate the extent, if any, to which RESPORGs would derive an undue advantage from information about shifts in traffic that do not involve a RESPORG change, or how Sprint's request would mitigate any such advantage. For example, many SMS changes will involve only small shifts in traffic, and it is not clear that a RESPORG with advance notice of these relatively minor changes would attempt to use this information to subvert the change. In these situations, such action by the RESPORG could antagonize the customer, thereby risking the RESPORG's continuing relationship with that customer. Similarly, as a practical matter, customers may coordinate minor routing changes with their

routing or RESPORG changes to an existing SMS record and would not create initial SMS records, handle "trouble tickets" for an 800 service account, or market or sell the 800 services of any 800 service provider.

[11] Ad Hoc Comments at 1-2; ARINC Comments at 1-3; CompTel Comments at 1-3.

[12] ARINC Comments at 2; Ad Hoc Comments at 1-2; CompTel Comments at 2-3. Although they support Sprint's petition, Ad Hoc and CompTel argue that Sprint's petition does not go far enough and assert that any entity should be permitted to function as a RESPORG. Ad Hoc Comments at 2-3; CompTel Comments at 3-4. AT&T and MCI argue that only access purchasers should be permitted to serve as RESPORGs. The issue of who generally can be a RESPORG is addressed in the *CompTel Order*. *See* note 3, *supra*.

[13] AT&T Comments at 3-4; BOC Comments at 1-2. LECs, IXCs, and user representatives are all participating in 800 Committee deliberations.

[14] AT&T Comments at 2.

[15] AT&T Comments at 7; *but see* Sprint Reply at 4-6; MCI Reply at 4-5.

[16] BOCs Comments at 4; MCI Comments at 3; *see also* CompTel Comments at 3.

[17] MCI Comments at 3, Reply at 2, n.3. In its comments, MCI previously opposed Sprint's petition as premature. However, it now supports the petition to the extent indicated above. *See* Letter from Carol Schultz, Senior Manager Regulatory Affairs, MCI, to Donna R. Searcy, Secretary, FCC, November 19, 1992.

[18] We will permit the BOCs to include separate rate elements in SMS tariffs for these NASC-initiated RESPORG changes.

[19] *See* Sprint Reply at 4. Thus, contrary to the argument of AT&T, we find that advance knowledge of a customer's intention to change carriers gained through a carrier's status as a RESPORG is not a legitimate competitive tool.

service providers, including their RESPORG. In that event, their RESPORG would have advance knowledge of their traffic changes, even if we granted Sprint's request.

13. We note, second, that we also lack information about the resources that would be required for the NASC to serve as a substitute for RESPORGs in making SMS traffic routing changes. While authorizing the NASC to make simple RESPORG changes should impose little additional burden on the NASC, involving the NASC in routing changes as well could increase substantially the resources required of the NASC. Significantly, no party has presented any evidence as to whether the NASC currently has the technical capability to make such changes, how many such changes it would have to make, or the resources needed to take on these additional responsibilities.

14. Furthermore, our decision above permitting the NASC to make RESPORG changes, along with the Commission's earlier holding that users should be able to choose any qualified entity as their RESPORG, substantially obviates the need for the action Sprint requests. As a result of these decisions, customers will readily be able to replace RESPORGs that prove insufficiently responsive to their 800 service changes. Moreover, insofar as they will be able to choose any qualified entity, not just their major 800 carrier, as RESPORG, they will be able to name as RESPORG an entity that does not have a conflict of interest in implementing their SMS changes.

15. Finally, we reject assertions that authorizing the NASC to make RESPORG changes is tantamount to making the NASC a RESPORG.[20] We note that use of the NASC administrator to effect RESPORG changes will be optional, not mandatory, and that in effecting these RESPORG changes, the NASC adminstrator will perform only a very limited function. Under these circumstances, the NASC cannot reasonably be viewed as standing in the place of a regular RESPORG nor can it be convincingly argued that NASC neutrality is compromised.[21]

16. For the reasons set forth above, we grant, in part, Sprint's petition and authorize the NASC administrator to make RESPORG changes to the SMS. We believe that this will help to prevent unfair competition in the 800 service market by incumbent RESPORGs.

V. ORDERING CLAUSE

17. Accordingly, pursuant to the authority contained in Sections 0.91(a) and 0.291 of the Commission's Rules, 47 C.F.R. Sections 0.91(a) and 0.291, IT IS ORDERED that the Petition for Declaratory Ruling filed July 10, 1992 by Sprint is HEREBY GRANTED to the extent indicated herein, and otherwise IS DISMISSED WITHOUT PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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[20] *See* AT&T Comments at 4-5.
[21] *See* AT&T Comments at 5-6; *but see* MCI Reply at 4-5; Sprint Reply at 9.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LDDS Communications, Inc. — File No. ITC-92-162

Application for Authority pursuant. to Section 214 of the Communications Act of 1934, as amended, to provide Private Line Services Between the United States and Israel

Transasia Communications, Inc. — File No. ITC-92-204

Application for Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate facilities for the provision of common carrier services between the United States and the Philippines

Cable & Wireless Communications, Inc. — File No. ITC-90-190

Application for Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to Resell Services of Other Common Carriers to Provide Private Line Services between the United States and International Points.

ERRATA

Released: March 15, 1993

By the Chief, International Facilities Division:

1. On February 12, 1993, an *Order and Certification* was released, DA 93-147, granting the application of LDDS Communications, Inc. (LDDS) captioned above. On March 1, 1993, an *Order, Authorization and Certificate* was released, DA 93-210, granting the application of Transasia Communications, Inc. (Transasia) captioned above. On March 8, 1993, an *Order and Certification* was released, DA 93-246, granting the application of Cable & Wireless Communications, Inc. (CWCI) captioned above.

2. The instant errata changes paragraph 5 of DA 93-147 to read:

5. IT IS FURTHER ORDERED that:

(a) LDDS shall file publicly any contracts entered into with other carriers or a contract summary in accordance with Section 203 of the Communications Act, 47 U.S.C. § 203, and the *Interexchange Order*;[1]

(b) the services obtained by LDDS shall be made generally available to similarly situated customers at the same terms, conditions and rates; and

(c) LDDS shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

3. The instant errata changes paragraph 11 of DA 93-210 to read:

11. IT IS FURTHER ORDERED that:

(a) Transasia shall file publicly any contracts entered into with other carriers or a contract summary in accordance with Section 203 of the Communications Act, 47 U.S.C. § 203, and the *Interexchange Order*;[2]

(b) the services obtained by Transasia shall be made generally available to similarly situated customers at the same terms, conditions and rates; and

(c) Transasia shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

4. The instant errata changes paragraph 5 of DA 93-246 to read:

5. IT IS FURTHER ORDERED that:

(a) CWCI shall file publicly any contracts entered into with other carriers or a contract summary in accordance with Section 203 of the Communications Act, 47 U.S.C. § 203, and the *Interexchange Order*;[3]

(b) the services obtained by CWCI shall be made generally available to similarly situated customers at the same terms, conditions and rates; and

[1] *See Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, 5902 (1991) (*Interexchange Order*).
[2] *See Interexchange Order.*
[3] *See Interexchange Order.*

(c) CWCI shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

RCI Long Distance, Inc. — File No. I-T-C-91-077

Application for Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to Lease and Operate Facilities to Provide Private Line Services between the United States and Canada

ORDER AND CERTIFICATION

Adopted: March 8, 1993; Released: March 18, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the resale of international private lines for the provision of international private line services and international switched services to the general public by RCI Long Distance, Inc. (RCI).[1]

2. Accordingly, IT IS ORDERED that application File I-T-C-91-077 IS GRANTED and RCI is authorized to resell international private lines for the provision of international private line services and international private lines for the provision of switched services between the United States and Canada.[2]

3. IT IS FURTHER ORDERED that RCI is authorized to lease and operate pursuant to contract one-half interest in up to 8 T-1 circuits and in up to 10 Digital Data/Voice circuits from authorized U.S. common carriers for the authorized provision of international private line and switched services, subject to the following conditions:

(a) a copy of such contracts entered into with other carriers or a contract summary shall be publicly filed in accordance with Section 203 of the Communications Act, 47 U.S.C. §203, and the *Interexchange Order*;[3] and

(b) the services RCI obtains from authorized common carriers[4] shall be made generally available to similarly situated customers at the same, terms, conditions and rates.

4. IT IS FURTHER ORDERED that neither RCI nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions which is denied to any other United States carrier by reason of any concession contract, understanding, or working arrangement to which RCI or any such persons or companies controlling or controlled by RCI are parties.

5. IT IS FURTHER ORDERED that RCI shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

6. IT IS FURTHER ORDERED that the authority granted herein to resell international private lines between the United States and Canada is limited to the provision of the authorized services between the United States and Canada only -- that is, private lines which carry traffic that originates in the United States and terminates in Canada or traffic that originates in Canada and terminates in the United States.

7. IT IS FURTHER ORDERED that RCI shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that RCI shall file semiannual reports of circuit additions to Canada, pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. §63.10(b).

9. IT IS FURTHER ORDERED that RCI shall file a copy of any operating agreements entered into with foreign correspondents with the Commission within 30 days of their execution.

10. IT IS FURTHER ORDERED that RCI shall file all arrangements for private line interconnection to the U.S. public switched network, pursuant to Section 43.51(a) of our Rules, 47 C.F.R. §43.51(a).

11. IT IS FURTHER ORDERED that this Order may be subject to future modification pursuant to the outcome of the *Phase II Third Further Notice, fONOROLA (recon. pending)*, and any related proceedings.

12. IT IS FURTHER ORDERED that grant of this authorization is conditioned upon Canada's continuing to afford resale opportunities equivalent to those afforded under U.S. law.

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[1] RCI is a wholly-owned subsidiary of Rochester Telephone Corporation (RTC). RTC, through various wholly-owned subsidiaries, provides exchange and long distance land line common carrier services.

[2] In *fONOROLA Corporation and EMI Communications Corporation (fONOROLA)*, 7 FCC Rcd 7312 (1992), *petition for recon. pending*, the Commission determined that Canada affords resale opportunities equivalent to those available under U.S. law. Therefore, resale of international private lines for switched services and of interconnected international private lines for private line services between the United States and Canada is permitted subject to appropriate authorization.

[3] *See Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, 5902 (1991)(*Interexchange Order*). *See also Cable and Wireless Communications, Inc.*, 7 FCC Rcd 6653 (1992).

[4] Initially, RCI intends to resell the services of AT&T, MCI, and U.S. Sprint. *See* Application and amendments.

13. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services RCI seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

14. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this Order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

IDB COMMUNICATIONS GROUP, INC. File No. I-T-C-93-019

For Authority Pursuant to Section 214 of the Communications Act of 1934 to Operate as an International Resale Carrier for International Switched Voice Services

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 8, 1993; Released: March 18, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application filed by IDB Communications Group, Inc. (IDB) requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require this grant.

2. Accordingly, IT IS ORDERED, that application File No. I-T-C-93-019 IS GRANTED and IDB is authorized to provide international switched voice services by the resale of international switched voice service set forth in AT&T Tariff F.C.C. No. 1, Cable and Wireless Tariff F.C.C. No. 3, MCI Tariff F.C.C. No. 1, US Sprint Tariffs F.C.C. Nos. 1 and 2 and TRT/FTC Tariff F.C.C. No. 15 between the United States and international points listed in Appendix A.

3. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61 for the services authorized in this order.

4. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

5. IT IS FURTHER ORDERED that IDB shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services between the United States and all international points it is authorized to serve within 90 days from the end of each calendar quarter.

6. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

7. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between the applicant and its correspondent in each of the countries to which it is authorized to provide service, and the applicant shall file copies of the agreement with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51, and in *Regulation of International Accounting Rates*, Phase II, First Report and Order, 57 Fed. Reg. 646 (1992) (to be codified at 47 C.F.R. §43.51(a)(3)).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX A

Country
Albania
Algeria
American Samoa
Andorra
Angola
Anguilla
Antigua & Barbuda
Argentina
Aruba
Ascension Island
Austria
Australia
Bahamas
Bahrain
Bangladesh
Barbados
Belgium
Belize
Benin
Bermuda
Bhutan
Bolivia
Botswana
Brazil
British Virgin Islands
(including Anegada, Camanoe Island, Guana Island, Jost Van Dyke, Little Thatch, Marina Cay, Mosquito Island, N. Sound, Peter Island, Salt Island, Tortola and Virgin Gorda)
Brunei
Bulgaria
Burkina Faso
Cameroon
Canada
Cape Verde Islands
Cayman Islands
Chile
China
Colombia
Congo
Cook Islands
Costa Rica
Cyprus
Czechoslovakia
Denmark (including Faeroe Islands)
Djibouti
Dominica
Dominican Republic
Ecuador

Egypt
El Salvador
Ethiopia
Fiji
Finland
France
French Antilles (including Martinique, St. Barthelemy and St. Martin)
French Guiana
French Polynesia (including islands of Moorea & Tahiti)
Gabon
Gambia
Germany

Ghana
Gibraltar
Greece
Greenland
Grenada (including Carriacou)
Guadeloupe
Guam
Guantanamo (U.S. Naval Base)
Guatemala
Guinea
Guinea-Bissau
Guyana
Haiti
Honduras
Hong Kong
Hungary
Iceland
India
Indonesia
Iran
Ireland
Israel
Italy
Ivory Coast
Jamaica
Japan (including Okinawa)
Jordan
Kenya
Kiribati
Korea, (South)
Kuwait
Lesotho
Liberia
Libya
Liechtenstein
Luxembourg
Macao

Malawi
Malaysia
Maldives
Mali Republic
Malta
Marshall Islands
Mauritania
Mauritius
Mayotte Island
Mexico
Micronesia, Federated States of
Monaco
Montserrat
Morocco
Mozambique
Namibia
Nauru
Nepal
Netherlands
Netherlands Antilles (including Bonaire, Curacao Saba, St. Eustatius, and St. Maarten)
Nevis
New Caledonia & Dependencies
New Zealand (including Chatham Islands)
Nicaragua
Nigeria
Niger Republic
Norway (including Svalbard)
Oman
Pakistan
Panama
Papua New Guinea (including Admiralty Islands, Bougainville, New Britain, & New Ireland)
Paraguay
Peru
Poland
Portugal (including Azores & Madeira Islands)
Philippines
Qatar
Reunion Island
Romania
Rwanda
St. Kitts
St. Lucia
St. Pierre & Miquelon
St. Vincent & The Grenadines
Saipan (including Rota & Tinian)
San Marino

Sao-Tome
Saudi Arabia
Senegal
Seychelles
Sierra Leone
Singapore
Solomon Island
South Africa
Spain (including Balearic Islands, Canary Islands, Ceuta, and Melilla)
Sri Lanka
Suriname
Swaziland
Sweden
Switzerland
Syria
Taiwan
Tanzania
Thailand
Togo, Republic of
Tonga Islands
Trinidad & Tobago
Tunisia
Turkey
Turks & Caicos Islands
Uganda
United Arab Emirates (including Abu Dhabi, Ajman, Dubai, Fujeirah, Ras Al Khaimeh, Sharjah and Umm Al Qaiwain)
United Kingdom (including the Channel Islands, England, Isle of Man, Northern Ireland, Scotland, and Wales)
Uruguay
U.S.S.R. (Moscow Only)
Vanuatu
Vatican City
Venezuela
Western Samoa
Yemen Arab Republic
Yugoslavia
Zambia
Zaire
Zimbabwe

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

IDB COMMUNICATIONS GROUP, INC. File No. I-T-C-93-024

Application for authority to lease and operate satellite facilities for service to various overseas points.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 11, 1993; Released: March 18, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and the points listed in the Appendix by IDB Communications Group, Inc. (IDB).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-024 IS GRANTED, and IDB is authorized to:

a. lease from Comsat and operate the numbers of satellite half-circuits listed in the Appendix between the appropriately licensed earth stations in the U.S. and appropriate INTELSAT satellites, connecting with similar circuits between the satellites and earth stations at the points listed in the Appendix furnished by IDB's correspondents;

b. lease and operate circuits in the appropriately licensed earth stations to be used in conjunction with the satellite space segment capacity;

c. lease and operate any necessary domestic connecting facilities; and

d. use said facilities to provide international public switched network services between the U.S. and the points listed in the Appendix hereto.

3. IT IS FURTHER ORDERED that neither IDB nor any persons or companies directly or indirectly controlling or controlled by IDB, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which IDB or any persons or companies controlling or controlled by IDB are parties.

4. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

5. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between IDB and its correspondents, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

7. IT IS FURTHER ORDERED that IDB shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that IDB shall file quarterly reports of revenue, number of messages, and number of minutes of originating and terminating traffic for all countries individually within 90 days from the end of each calendar quarter.

9. IT IS FUTHER ORDERED that IDB shall file additional Section 214 application to supplement existing facilities for service to any overseas points it is authorized to serve.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX

Country	Number of Circuits	Country	Number of Circuits
Algeria	10	Cote D'Ivoire	10
American Samoa	10	Croatia	10
Angola	10	Curacao	10
Antarctica	10	Cyprus	30
Antigua	10	Czechoslovakia	10
Argentina	60	Denmark	10
Aruba	10	Diego Garcia	10
Ascension Islands	10	Dominican Republic	24
Australia	90	Ebeye	10
Austria	10	Ecuador	10
Azores	10	Egypt	10
Bahamas	10	El Salvador	24
Bahrain	10	Estonia	24
Barbados	10	Ethiopia	10
Belgium	30	Fiji Island	10
Belize	10	Finland	10
Benin	10	France	60
Bermuda	10	French Guiana	10
Bolivia	30	French Polynesia	10
Bosnia	10	Gabon	10
Botswana	10	Gambia	10
Brazil	60	Germany	60
Brunei	10	Ghana	10
Bulgaria	10	Gibraltar	10
Burkina Faso	10	Greece	10
Burma	10	Grenada	10
Cameroon	10	Guam	10
Canada	60	Guatemala	24
Canary Islands	10	Guinea	10
Cape Verde	10	Guyana	30
Cayman Islands	10	Haiti	10
Central African Republic	10	Honduras	24
Chad	10	Hong Kong	60
Chile	60	Hungary	10
China	60	Iceland	10
Christmas Island	10	India	10
Colombia	30	Indonesia	30
Congo	10	Iran	10
Cook Island	10	Ireland	10
Costa Rica	30	Israel	60

APPENDIX

Country	Number of Circuits	Country	Number of Circuits
Italy	30	Oman	10
Ivory Coast	10	Pakistan	10
Jamaica	10	Palau	10
Japan	60	Panama	30
Jordan	10	Papua New Guinea	10
Kenya	10	Paraguay	10
Kiribati	10	Peru	30
Korea	60	Philippines	60
Kosrae	10	Poland	10
Kuwait	30	Ponape	10
Latvia	10	Portugal	10
Lebanon	30	Qatar	10
Lesotho	10	Romania	10
Liberia	10	Saipan	10
Liechtenstein	10	San Marino	10
Lithuania	60	Saudi Arabia	30
Luxembourg	10	Senegal	10
Madagascar	10	Singapore	10
Majuro	10	Slovenia	10
Malagasy Republic	10	Solomon Island	10
Malawi	10	South Africa	10
Malaysia	10	Spain	30
Mali	10	Sri Lanka	10
Malta	10	St. Lucia	10
Mariana Island	10	St. Vincent	10
Martinique	10	Surinam	10
Mauritania	10	Sweden	10
Mexico	30	Switzerland	10
Monaco	10	Syria	10
Morocco	10	Taiwan	30
Mozambique	10	Tanzania	10
Nauru	10	Thailand	10
Netherland Antilles	10	Togo	10
Netherlands	15	Tonga	10
New Zealand	60	Trinidad	10
New Guinea	10	Truk	10
New Caledonia	10	Tunisia	10
Nicaragua	24	Turkey	24
Niger	10	Turks and Caicos Islands	10
Nigeria	10	U.S.S.R.	90
Norway	10	Uganda	10

APPENDIX

Country	Number of Circuits
United Arab Emirates	10
United Kingdom	90
Uruguay	10
Vanuatu	10
Venezuela	30
Vietnam	30
Western Samoa	10
Yap	10
Yemen	10
Yugoslavia	10
Zaire	24
Zambia	10
Zimbabwe	10

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the
Applications of

Charles D. Benson

For Authority to Construct
and Operate Multichannel
Multipoint Distribution Service
Stations on E and F-group channels at

	File Nos.
Cheboygan, Michigan	1920-CM-P-83
Gaylord, Michigan	1922-CM-P-83
Lansing, Michigan	1923-CM-P-83
Manistique, Michigan	1924-CM-P-83
Marquette, Michigan	1925-CM-P-83
Petosky, Michigan	1926-CM-P-83
Sault Ste. Marie, Michigan	1927-CM-P-83

ORDER ON RECONSIDERATION

Adopted: March 11, 1993; Released: March 19, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction.* Before the Bureau are petitions for reconsideration of the determination by the Domestic Facilities Division (Division) that the above-referenced applications of Charles D. Benson (Benson) to construct and operate Multichannel Multipoint Distribution Service (MMDS) stations on the E and F-group channels at the above-captioned locations were unacceptable for filing.

2. *Division Return.* The Division determined that Benson's applications were unacceptable for filing because each lacked the technical analysis required by 47 C.F.R. Sec. 21.901(d)(7). The omission of this information in Benson's applications rendered the applications incomplete and not in a "condition acceptable for filing." Therefore, Benson's applications were returned as unacceptable for filing, pursuant to Sec. 21.20(a) of the Rules.

3. *Pleading.* On reconsideration, Benson states that his applications did make reference to the requirements prescribed by Sec. 21.901(d)(7). In two sentences, Benson stated "[t]he ITFS band has been searched for a distance of sixty five miles from the proposed site. No co-channel or first adjacent channel ITFS facilities are currently proposed or authorized within that sixty five mile radius." Benson argues that this statement demonstrated sufficient compliance with Section 21.901(d)(7) because "the application showed how interference would be avoided by demonstrating none could exist. Moreover, Exhibit H also complies with Section 21.902(a) by demonstrating that interference would be avoided due to the lack of other facilities." Benson's Petition at 2.

4. *Discussion.* The arguments presented by Benson are without merit. Prior to the filing of any MMDS applications, including Benson's, the Commission declared that each MMDS applicant had to submit, as part of its application, a specific technical interference protection showing for cochannel and adjacent channel stations.[1] To effectuate its decision, the Commission added 47 C.F.R. Sec. 21.901(d)(7) to the Commission's rules.[2] The Commission asked for the technical showing required by Section 21.901(d)(7) as a means of determining each MMDS applicant's awareness of the problems and technical competence to mitigate interference conflicts that might arise. *Advancom, Inc.*, (Comm. Car. Bur. Dec. 31, 1984). The consequences of failing to provide this demonstration was unequivocally stated:

> We stress again that we expect applicants to address this problem in their applications. Those applications that do not contain an analysis of how the applicant intends to avoid cochannel interference in adjacent areas will not be considered acceptable for filing.

MMDS Allocation Order, 94 FCC 2d at 1264. Thus, all applicants were required, at a minimum, to submit a generic statement of how they would resolve cochannel and adjacent channel interference that would likely be encountered when several MMDS stations began operation in the same area. *Advancom* at 3.

5. This interference protection showing is a significant requirement because the Commission, in reallocating spectrum from the Instructional Television Fixed Service (ITFS) to MMDS, did so with the understanding that certain adjacent channel interference problems might arise. *MMDS Allocation Order*, 94 FCC 2d at 1246.[3] Many of those commenting on the MMDS reallocation proposal expressed the view that such operation was not technically

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[1] Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations with regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, 94 FCC 2d 1203, 1247, 1264 (1983) (hereinafter cited as MMDS Allocation Order).

[2] This rule provision requires each MMDS applicant to show how interference with the operation of adjacent channels would be avoided and to show what steps had been taken to comply with 47 C.F.R. Sec 21.902(a). Section 21.902(a) requires, *inter alia* MDS applicants to make exceptional efforts to avoid blocking *potential* adjacent channel use in the same city and cochannel use in nearby cities. (Emphasis added). To assist us in enforcing Section 21.902(a) "the applicant must explain what efforts it has made to comply with this section." Id. at 1264.

[3] The assignment of the four E channels to one station and the four F channels to another station "has the disadvantage that widespread adjacent channel interference could occur if the transmitters of the two operators are not colocated." Id. at 1264. "[T]he use of channels in one pair of an interleaved group [such as E-group] tends to preclude use of the other group [such as F-group] in the same area." Id. For this reason, the Commission emphasized that it would "require each applicant to include, as part of its application, an analysis of the potential for adjacent channel interference with a non-colocated licensee operating on the interleaved channel group." Id. at 1247.

feasible using existing MDS or ITFS equipment. Others expressed the view that such operations were feasible, but the stations had to be carefully engineered. Also, Section 21.901(d)(7) was adopted because the Commission anticipated that some authorized cochannel stations would be spaced more closely than ordinarily would be allowed. Closely-spaced cochannel stations can be successfully operated but require careful planning and engineering.[4]

6. A prospective MMDS licensee's ability to provide interference protection to other cochannel or adjacent channel licensees was an integral part of the Commission's reallocation plan. Toward that end, the technical showing required by Section 21.901(d)(7) serves as a means of determining an applicant's awareness of potential interference problems and technical competence to offer MMDS by resolving potential interference problems with other cochannel or adjacent channel stations operating within 50 miles or the radio horizon of a proposed MMDS transmitter site.[5] This required demonstration is also necessary because cochannel and adjacent-channel MMDS station applications for the above-referenced applications and immediately adjacent areas were filed on the same day without the submission of interference analyses which are usually required for applications proposing cochannel and adjacent channel stations located within 50 miles or the radio horizon. As distinguished from the Section 21.901(d)(7) technical showing, the Commission waived the requirement that applicants, at the time of filing, submit a detailed actual interference study required by Section 21.902(c)(1), 47 C.F.R. § 21.902(c)(1). *Advancom* at 4. This section requires that applicants submit an analysis of the potential for harmful interference to *existing or to previously proposed stations* located within 50 miles of the proposed station. (Emphasis added). Thus, through the waiver of Section 21.902(c)(1), an MMDS applicant would not be required to show non-interference with existing and proposed cochannel and adjacent channels ITFS users until after a construction authorization has been granted. The Commission concluded that it would not serve the public interest to have *all* applicants file an interference study where only the study submitted by successful applicants would be considered by the Commission staff. *Id.*

7. At the time Benson filed his applications, he had notice that all MMDS applicants, at the time of filing, must submit a demonstration specifying the techniques the applicant would employ to avoid potential cochannel or adjacent channel interference. In the *MMDS Allocation Order,* the Commission described clearly the kind of information applicants must submit in order to justify their technical competence in resolving cochannel and adjacent channel interference. The reallocation order specifically described cross-polarization and frequency offset as two engineering techniques that could be used to minimize interference. *Id.* at 1264. Benson's applications lacked reference to minimizing interference to the MMDS stations at the above-captioned locations, or MMDS stations in nearby areas.

8. The *MMDS Allocation Order* prescribed the filing requirements to be observed by MMDS applicants. The order specifically stated that "all applications are expected to comply with all pertinent sections of Part 21, including those we are adopting today...." *Id.* at 1238. Each MMDS applicant is required to demonstrate its technical qualifications to be an MMDS licensee. 47 C.F.R. Sec. 21.13. Benson's failure to submit the necessary interference protection showing required by Section 21.901(d)(7) renders its application incomplete and unacceptable for filing in accordance with 47 C.F.R. Sec. 21.20(a). Therefore, Benson's applications were not in a "condition acceptable for filing" on the filing date, and was therefore unacceptable for filing.[6]

9. In his application, Benson stated he was familiar with the Commission's rules relevant to MMDS in item 33 of FCC Form 435 and the applicant's certification, item 36 of FCC Form 435. Any applicant who "either ignores or fails to understand clear and valid rules of the Commission respecting the requirements for an application assumes the risk that the application will not be acceptable for filing." *Ranger v. FCC,* 294 F.2d 240, 242 (1961). Benson's showing demonstrates that he failed to understand the difference between, on the one hand, the previously-proposed and existing ITFS stations, and, on the other hand, MMDS proposals to be filed concurrently with the filing of Benson's application. Benson's failure to comprehend and comply with the filing standards all MMDS applicants are required to meet cannot be used to avoid the consequences of his failure.[7]

10. *Conclusion.* Having carefully considered all of the arguments and evidence submitted by Benson, we find that it was proper for the Division to return Benson's applications as unacceptable for filing, and reconsideration of that decision is not warranted. Accordingly, Charles D. Benson's request for reconsideration and reinstatement of the above-referenced applications IS DENIED. This order is issued pursuant to 47 C.F.R. Sec 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

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[4] To mitigate the effects of the problem of "gridlock," the Commission decided to group MMDS applications for lottery, where possible, according to Metropolitan Statistical Areas (MSAs), Consolidated Metropolitan Statistical Areas (CMSAs), or New England Consolidated Metropolitan Areas (NECMAs) in which the MMDS transmitter sites were located. "Gridlock" is the situation in which a large number of applications are filed in multiple adjacent areas resulting in all the applications being considered mutually exclusive. Although this lottery grouping method eliminates the "gridlock" problem where there are statistical areas, it can result in some cochannel stations being spaced more closely than would be allowed by traditional rules for determining the potential for harmful interference. Id. at 1264.

[5] "In those situations where [statistical areas]... are so close that a single transmitter could produce a signal strong enough to cause harmful interference in both [statistical areas], we require that each applicant... detail what steps it will take to prevent blocking cochannel use in the adjacent" statistical area. Id. at 1264.

[6] See Amendment of Parts 1 and 21 of the Commission's Rules and Regulations Applicable to the Domestic Public Radio Services (Other than Maritime), 60 FCC 2d 549 (1976); see also Revision of Part 21 of The Commission's Rules, 2 FCC Rcd 5713 (1987).

[7] We reject Benson's contention that he should be permitted to file curative amendments and have his applications reinstated, *nunc pro tunc,* for further processing. We believe that the Division's initial return of the Benson applications as unacceptable for filing was correct, and thus, *nunc pro tunc* reinstatement is not justified.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the
Applications of

Marilyn A. Benson

For Authority to Construct
and Operate Multichannel
Multipoint Distribution Service
Stations on the E and F-group
channels at

	File Nos.
Cadillac, Michigan	1963-CM-P-83
Cheboygan, Michigan	1964-CM-P-83
Escanaba, Michigan	1965-CM-P-83
Manistique, Michigan	1968-CM-P-83
Marquette, Michigan	1969-CM-P-83
Petosky, Michigan	1970-CM-P-83
Sault Ste. Marie, Michigan	1971-CM-P-83
St. Ignace, Michigan	1972-CM-P-83
Traverse City, Michigan	1973-CM-P-83

ORDER ON RECONSIDERATION

Adopted: March 11, 1993; Released: March 19, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction.* Before the Bureau are petitions for reconsideration of the determination by the Domestic Facilities Division (Division) that the above-referenced applications of Marilyn A. Benson (Benson) to construct and operate Multichannel Multipoint Distribution Service (MMDS) stations on the E and F-group channels at the above-captioned locations were unacceptable for filing.

2. *Division Return.* The Division determined that Benson's applications were unacceptable for filing because each lacked the technical analysis required by 47 C.F.R. Sec. 21.901(d)(7). The omission of this information in Benson's applications rendered the applications incomplete and not in a "condition acceptable for filing." Therefore, Benson's applications were returned as unacceptable for filing, pursuant to Sec. 21.20(a) of the Rules.

3. *Pleading.* On reconsideration, Benson states that her applications did make reference to the requirements prescribed by Sec. 21.901(d)(7). In two sentences, Benson stated "[t]he ITFS band has been searched for a distance of sixty five miles from the proposed site. No co-channel or first adjacent channel ITFS facilities are currently proposed or authorized within that sixty five mile radius." Benson argues that this statement demonstrated sufficient compliance with Section 21.901(d)(7) because "the application showed how interference would be avoided by demonstrating none could exist. Moreover, Exhibit H also complies with Section 21.902(a) by demonstrating that interference would be avoided due to the lack of other facilities." Benson's Petition at 2.

4. *Discussion.* The arguments presented by Benson are without merit. Prior to the filing of any MMDS applications, including Benson's, the Commission declared that each MMDS applicant had to submit, as part of its application, a specific technical interference protection showing for cochannel and adjacent channel stations.[1] To effectuate its decision, the Commission added 47 C.F.R. Sec. 21.901(d)(7) to the Commission's rules.[2] The Commission asked for the technical showing required by Section 21.901(d)(7) as a means of determining each MMDS applicant's awareness of the problems and technical competence to mitigate interference conflicts that might arise. *Advancom, Inc.*, (Comm. Car. Bur. Dec. 31, 1984). The consequences of failing to provide this demonstration was unequivocally stated:

> We stress again that we expect applicants to address this problem in their applications. Those applications that do not contain an analysis of how the applicant intends to avoid cochannel interference in adjacent areas will not be considered acceptable for filing.

MMDS Allocation Order, 94 FCC 2d at 1264. Thus, all applicants were required, at a minimum, to submit a generic statement of how they would resolve cochannel and adjacent channel interference that would likely be encountered when several MMDS stations began operation in the same area. *Advancom* at 3.

5. This interference protection showing is a significant requirement because the Commission, in reallocating spectrum from the Instructional Television Fixed Service (ITFS) to MMDS, did so with the understanding that certain adjacent channel interference problems might arise. *MMDS Allocation Order*, 94 FCC 2d at 1246.[3] Many of

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[1] Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations with regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, 94 FCC 2d 1203, 1247, 1264 (1983) (hereinafter cited as MMDS Allocation Order).

[2] This rule provision requires each MMDS applicant to show how interference with the operation of adjacent channels would be avoided and to show what steps had been taken to comply with 47 C.F.R. Sec 21.902(a). Section 21.902(a) requires, *inter alia*, MDS applicants to make exceptional efforts to avoid blocking *potential* adjacent channel use in the same city and cochannel use in nearby cities. (Emphasis added). To assist us in enforcing Section 21.902(a) "the applicant must explain what efforts it has made to comply with this section." Id. at 1264.

[3] The assignment of the four E channels to one station and the four F channels to another station "has the disadvantage that widespread adjacent channel interference could occur if the transmitters of the two operators are not colocated." Id. at 1264. "[T]he use of channels in one pair of an interleaved group [such as E-group] tends to preclude use of the other group [such as F-group] in the same area." Id. For this reason, the Commission emphasized that it would "require each applicant to include, as

those commenting on the MMDS reallocation proposal expressed the view that such operation was not technically feasible using existing MDS or ITFS equipment. Others expressed the view that such operations were feasible, but the stations had to be carefully engineered. Also, Section 21.901(d)(7) was adopted because the Commission anticipated that some authorized cochannel stations would be spaced more closely than ordinarily would be allowed. Closely-spaced cochannel stations can be successfully operated but require careful planning and engineering.[4]

6. A prospective MMDS licensee's ability to provide interference protection to other cochannel or adjacent channel licensees was an integral part of the Commission's reallocation plan. Toward that end, the technical showing required by Section 21.901(d)(7) serves as a means of determining an applicant's awareness of potential interference problems and technical competence to offer MMDS by resolving potential interference problems with other cochannel or adjacent channel stations operating within 50 miles or the radio horizon of a proposed MMDS transmitter site.[5] This required demonstration is also necessary because cochannel and adjacent-channel MMDS station applications for the above-referenced applications and immediately adjacent areas were filed on the same day without the submission of interference analyses which are usually required for applications proposing cochannel and adjacent channel stations located within 50 miles or the radio horizon. As distinguished from the Section 21.901(d)(7) technical showing, the Commission waived the requirement that applicants, at the time of filing, submit a detailed actual interference study required by Section 21.902(c)(1), 47 C.F.R. § 21.902(c)(1). *Advancom* at 4. This section requires that applicants submit an analysis of the potential for harmful interference to *existing or to previously proposed stations* located within 50 miles of the proposed station. (Emphasis added). Thus, through the waiver of Section 21.902(c)(1), an MMDS applicant would not be required to show non-interference with existing and proposed cochannel and adjacent channels ITFS users until after a construction authorization has been granted. The Commission concluded that it would not serve the public interest to have *all* applicants file an interference study where only the study submitted by successful applicants would be considered by the Commission staff. *Id.*

7. At the time Benson filed her applications, she had notice that all MMDS applicants, at the time of filing, must submit a demonstration specifying the techniques the applicant would employ to avoid potential cochannel or adjacent channel interference. In the *MMDS Allocation Order,* the Commission described clearly the kind of information applicants must submit in order to justify their technical competence in resolving cochannel and adjacent channel interference. The reallocation order specifically described cross-polarization and frequency offset as two engineering techniques that could be used to minimize interference. *Id.* at 1264. Benson's applications lacked reference to minimizing interference to the MMDS stations at the above-captioned locations, or MMDS stations in nearby areas.

8. The *MMDS Allocation Order* prescribed the filing requirements to be observed by MMDS applicants. The order specifically stated that "all applications are expected to comply with all pertinent sections of Part 21, including those we are adopting today...." *Id.* at 1238. Each MMDS applicant is required to demonstrate its technical qualifications to be an MMDS licensee. 47 C.F.R. Sec. 21.13. Benson's failure to submit the necessary interference protection showing required by Section 21.901(d)(7) renders its application incomplete and unacceptable for filing in accordance with 47 C.F.R. Sec. 21.20(a). Therefore, Benson's applications were not in a "condition acceptable for filing" on the filing date, and was therefore unacceptable for filing.[6]

9. In her application, Benson stated she was familiar with the Commission's rules relevant to MMDS in item 33 of FCC Form 435 and the applicant's certification, item 36 of FCC Form 435. Any applicant who "either ignores or fails to understand clear and valid rules of the Commission respecting the requirements for an application assumes the risk that the application will not be acceptable for filing." *Ranger v. FCC,* 294 F.2d 240, 242 (1961). Benson's showing demonstrates that she failed to understand the difference between, on the one hand, the previously-proposed and existing ITFS stations, and, on the other hand, MMDS proposals to be filed concurrently with the filing of Benson's application. Benson's failure to comprehend and comply with the filing standards all MMDS applicants are required to meet cannot be used to avoid the consequences of her failure.[7]

10. *Conclusion.* Having carefully considered all of the arguments and evidence submitted by Benson, we find that it was proper for the Division to return Benson's applications as unacceptable for filing, and reconsideration of that decision is not warranted. Accordingly, Marilyn A. Benson's request for reconsideration and reinstatement of the above-referenced applications IS DENIED. This order is issued pursuant to 47 C.F.R. Sec 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

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part of its application, an analysis of the potential for adjacent channel interference with a non-colocated licensee operating on the interleaved channel group." Id. at 1247.

[4] To mitigate the effects of the problem of "gridlock," the Commission decided to group MMDS applications for lottery, where possible, according to Metropolitan Statistical Areas (MSAs), Consolidated Metropolitan Statistical Areas (CMSAs), or New England Consolidated Metropolitan Areas (NECMAs) in which the MMDS transmitter sites were located. "Gridlock" is the situation in which a large number of applications are filed in multiple adjacent areas resulting in all the applications being considered mutually exclusive. Although this lottery grouping method eliminates the "gridlock" problem where there are statistical areas, it can result in some cochannel stations being spaced more closely than would be allowed by traditional rules for determining the potential for harmful interference. Id. at 1264.

[5] "In those situations where [statistical areas]... are so close that a single transmitter could produce a signal strong enough to cause harmful interference in both [statistical areas], we require that each applicant... detail what steps it will take to prevent blocking cochannel use in the adjacent" statistical area. Id. at 1264.

[6] See Amendment of Parts 1 and 21 of the Commission's Rules and Regulations Applicable to the Domestic Public Radio Services (Other than Maritime), 60 FCC 2d 549 (1976); see also Revision of Part 21 of The Commission's Rules, 2 FCC Rcd 5713 (1987).

[7] We reject Benson's contention that she should be permitted to file curative amendments and have her applications reinstated, *nunc pro tunc,* for further processing. We believe that the Division's initial return of the Benson applications as unacceptable for filing was correct, and thus, *nunc pro tunc* reinstatement is not justified.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the
Applications of

Gertrude M. Benson

For Authority to Construct
and Operate Multichannel
Multipoint Distribution Service
Stations on the E and F-group
channels at

	File Nos.
Cadillac, Michigan	1941-CM-P-83
Cheboygan, Michigan	1942-CM-P-83
Escanaba, Michigan	1943-CM-P-83
Gaylord, Michigan	1944-CM-P-83
Lansing, Michigan	1945-CM-P-83
Manistique, Michigan	1946-CM-P-83
Marquette, Michigan	1947-CM-P-83
Petosky, Michigan	1948-CM-P-83
Sault Ste. Marie, Michigan	1949-CM-P-83
St. Ignace, Michigan	1950-CM-P-83
Traverse City, Michigan	1951-CM-P-83

ORDER ON RECONSIDERATION

Adopted: March 11, 1993; Released: March 19, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction.* Before the Bureau are petitions for reconsideration of the determination by the Domestic Facilities Division (Division) that the above-referenced applications of Gertrude M. Benson (Benson) to construct and operate Multichannel Multipoint Distribution Service (MMDS) stations on the E and F-group channels at the above-captioned locations were unacceptable for filing.

2. *Division Return.* The Division determined that Benson's applications were unacceptable for filing because each lacked the technical analysis required by 47 C.F.R. Sec. 21.901(d)(7). The omission of this information in Benson's applications rendered the applications incomplete and not in a "condition acceptable for filing." Therefore, Benson's applications were returned as unacceptable for filing, pursuant to Sec. 21.20(a) of the Rules.

3. *Pleading.* On reconsideration, Benson states that her applications did make reference to the requirements prescribed by Sec. 21.901(d)(7). In two sentences, Benson stated "[t]he ITFS band has been searched for a distance of sixty five miles from the proposed site. No co-channel or first adjacent channel ITFS facilities are currently proposed or authorized within that sixty five mile radius." Benson argues that this statement demonstrated sufficient compliance with Section 21.901(d)(7) because "the application showed how interference would be avoided by demonstrating none could exist. Moreover, Exhibit H also complies with Section 21.902(a) by demonstrating that interference would be avoided due to the lack of other facilities." Benson's Petition at 2.

4. *Discussion.* The arguments presented by Benson are without merit. Prior to the filing of any MMDS applications, including Benson's, the Commission declared that each MMDS applicant had to submit, as part of its application, a specific technical interference protection showing for cochannel and adjacent channel stations.[1] To effectuate its decision, the Commission added 47 C.F.R. Sec. 21.901(d)(7) to the Commission's rules.[2] The Commission asked for the technical showing required by Section 21.901(d)(7) as a means of determining each MMDS applicant's awareness of the problems and technical competence to mitigate interference conflicts that might arise. *Advancom, Inc.,* (Comm. Car. Bur. Dec. 31, 1984). The consequences of failing to provide this demonstration was unequivocally stated:

> We stress again that we expect applicants to address this problem in their applications. Those applications that do not contain an analysis of how the applicant intends to avoid cochannel interference in adjacent areas will not be considered acceptable for filing.

MMDS Allocation Order, 94 FCC 2d at 1264. Thus, all applicants were required, at a minimum, to submit a generic statement of how they would resolve cochannel and adjacent channel interference that would likely be encountered when several MMDS stations began operation in the same area. *Advancom* at 3.

5. This interference protection showing is a significant requirement because the Commission, in reallocating spectrum from the Instructional Television Fixed Service (ITFS) to MMDS, did so with the understanding that certain adjacent channel interference problems might arise. *MMDS Allocation Order,* 94 FCC 2d at 1246.[3] Many of those commenting on the MMDS reallocation proposal

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[1] Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations with regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, 94 FCC 2d 1203, 1247, 1264 (1983) (hereinafter cited as MMDS Allocation Order).

[2] This rule provision requires each MMDS applicant to show how interference with the operation of adjacent channels would be avoided and to show what steps had been taken to comply with 47 C.F.R. Sec 21.902(a). Section 21.902(a) requires, *inter alia,* MDS applicants to make exceptional efforts to avoid blocking *potential* adjacent channel use in the same city and cochannel use in nearby cities. (Emphasis added). To assist us in enforcing Section 21.902(a) "the applicant must explain what efforts it has made to comply with this section." Id. at 1264.

[3] The assignment of the four E channels to one station and the four F channels to another station "has the disadvantage that widespread adjacent channel interference could occur if the transmitters of the two operators are not colocated." Id. at 1264. "[T]he use of channels in one pair of an interleaved group [such as E-group] tends to preclude use of the other group [such as F-group] in the same area." Id. For this reason, the Commission emphasized that it would "require each applicant to include, as

expressed the view that such operation was not technically feasible using existing MDS or ITFS equipment. Others expressed the view that such operations were feasible, but the stations had to be carefully engineered. Also, Section 21.901(d)(7) was adopted because the Commission anticipated that some authorized cochannel stations would be spaced more closely than ordinarily would be allowed. Closely-spaced cochannel stations can be successfully operated but require careful planning and engineering.[4]

6. A prospective MMDS licensee's ability to provide interference protection to other cochannel or adjacent channel licensees was an integral part of the Commission's reallocation plan. Toward that end, the technical showing required by Section 21.901(d)(7) serves as a means of determining an applicant's awareness of potential interference problems and technical competence to offer MMDS by resolving potential interference problems with other cochannel or adjacent channel stations operating within 50 miles or the radio horizon of a proposed MMDS transmitter site.[5] This required demonstration is also necessary because cochannel and adjacent-channel MMDS station applications for the above-referenced applications and immediately adjacent areas were filed on the same day without the submission of interference analyses which are usually required for applications proposing cochannel and adjacent channel stations located within 50 miles or the radio horizon. As distinguished from the Section 21.901(d)(7) technical showing, the Commission waived the requirement that applicants, at the time of filing, submit a detailed actual interference study required by Section 21.902(c)(1), 47 C.F.R. § 21.902(c)(1). *Advancom* at 4. This section requires that applicants submit an analysis of the potential for harmful interference to *existing or to previously proposed stations* located within 50 miles of the proposed station. (Emphasis added). Thus, through the waiver of Section 21.902(c)(1), an MMDS applicant would not be required to show non-interference with existing and proposed cochannel and adjacent channels ITFS users until after a construction authorization has been granted. The Commission concluded that it would not serve the public interest to have *all* applicants file an interference study where only the study submitted by successful applicants would be considered by the Commission staff. *Id.*

7. At the time Benson filed her applications, she had notice that all MMDS applicants, at the time of filing, must submit a demonstration specifying the techniques the applicant would employ to avoid potential cochannel or adjacent channel interference. In the *MMDS Allocation Order*, the Commission described clearly the kind of information applicants must submit in order to justify their technical competence in resolving cochannel and adjacent channel interference. The reallocation order specifically described cross-polarization and frequency offset as two engineering techniques that could be used to minimize interference. *Id.* at 1264. Benson's applications lacked reference to minimizing interference to the MMDS stations at the above-captioned locations, or MMDS stations in nearby areas.

8. The *MMDS Allocation Order* prescribed the filing requirements to be observed by MMDS applicants. The order specifically stated that "all applications are expected to comply with all pertinent sections of Part 21, including those we are adopting today...." *Id.* at 1238. Each MMDS applicant is required to demonstrate its technical qualifications to be an MMDS licensee. 47 C.F.R. Sec. 21.13. Benson's failure to submit the necessary interference protection showing required by Section 21.901(d)(7) renders its application incomplete and unacceptable for filing in accordance with 47 C.F.R. Sec. 21.20(a). Therefore, Benson's applications were not in a "condition acceptable for filing" on the filing date, and was therefore unacceptable for filing.[6]

9. In her application, Benson stated she was familiar with the Commission's rules relevant to MMDS in item 33 of FCC Form 435 and the applicant's certification, item 36 of FCC Form 435. Any applicant who "either ignores or fails to understand clear and valid rules of the Commission respecting the requirements for an application assumes the risk that the application will not be acceptable for filing." *Ranger v. FCC*, 294 F.2d 240, 242 (1961). Benson's showing demonstrates that she failed to understand the difference between, on the one hand, the previously-proposed and existing ITFS stations, and, on the other hand, MMDS proposals to be filed concurrently with the filing of Benson's application. Benson's failure to comprehend and comply with the filing standards all MMDS applicants are required to meet cannot be used to avoid the consequences of her failure.[7]

10. *Conclusion.* Having carefully considered all of the arguments and evidence submitted by Benson, we find that it was proper for the Division to return Benson's applications as unacceptable for filing, and reconsideration of that decision is not warranted. Accordingly, Gertrude M. Benson's request for reconsideration and reinstatement of the above-referenced applications IS DENIED. This order is issued pursuant to 47 C.F.R. Sec 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

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part of its application, an analysis of the potential for adjacent channel interference with a non-colocated licensee operating on the interleaved channel group." Id. at 1247.

[4] To mitigate the effects of the problem of "gridlock," the Commission decided to group MMDS applications for lottery, where possible, according to Metropolitan Statistical Areas (MSAs), Consolidated Metropolitan Statistical Areas (CMSAs), or New England Consolidated Metropolitan Areas (NECMAs) in which the MMDS transmitter sites were located. "Gridlock" is the situation in which a large number of applications are filed in multiple adjacent areas resulting in all the applications being considered mutually exclusive. Although this lottery grouping method eliminates the "gridlock" problem where there are statistical areas, it can result in some cochannel stations being spaced more closely than would be allowed by traditional rules for determining the potential for harmful interference. Id. at 1264.

[5] "In those situations where [statistical areas]... are so close that a single transmitter could produce a signal strong enough to cause harmful interference in both [statistical areas], we require that each applicant... detail what steps it will take to prevent blocking cochannel use in the adjacent" statistical area. Id. at 1264.

[6] See Amendment of Parts 1 and 21 of the Commission's Rules and Regulations Applicable to the Domestic Public Radio Services (Other than Maritime), 60 FCC 2d 549 (1976); see also Revision of Part 21 of The Commission's Rules, 2 FCC Rcd 5713 (1987).

[7] We reject Benson's contention that she should be permitted to file curative amendments and have her applications reinstated, *nunc pro tunc*, for further processing. We believe that the Division's initial return of the Benson applications as unacceptable for filing was correct, and thus, *nunc pro tunc* reinstatement is not justified.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
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Applications of

Marylan J. Benson

For Authority to Construct
and Operate Multichannel
Multipoint Distribution Service
Stations on the E and F-group
channels at

	File Nos.
Cadillac, Michigan	1974-CM-P-83
Cheboygan, Michigan	1975-CM-P-83
Escanaba, Michigan	1976-CM-P-83
Gaylord, Michigan	1977-CM-P-83
Lansing, Michigan	1978-CM-P-83
Manistique, Michigan	1979-CM-P-83
Marquette, Michigan	1980-CM-P-83
St. Ignace, Michigan	1983-CM-P-83
Traverse City, Michigan	1984-CM-P-83

ORDER ON RECONSIDERATION

Adopted: March 11, 1993; Released: March 19, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction.* Before the Bureau are petitions for reconsideration of the determination by the Domestic Facilities Division (Division) that the above-referenced applications of Marylan J. Benson (Benson) to construct and operate Multichannel Multipoint Distribution Service (MMDS) stations on the E and F-group channels at the above-captioned locations were unacceptable for filing.

2. *Division Return.* The Division determined that Benson's applications were unacceptable for filing because each lacked the technical analysis required by 47 C.F.R. Sec. 21.901(d)(7). The omission of this information in Benson's applications rendered the applications incomplete and not in a "condition acceptable for filing." Therefore, Benson's applications were returned as unacceptable for filing, pursuant to Sec. 21.20(a) of the Rules.

3. *Pleading.* On reconsideration, Benson states that her applications did make reference to the requirements prescribed by Sec. 21.901(d)(7). In two sentences, Benson stated "[t]he ITFS band has been searched for a distance of sixty five miles from the proposed site. No co-channel or first adjacent channel ITFS facilities are currently proposed or authorized within that sixty five mile radius." Benson argues that this statement demonstrated sufficient compliance with Section 21.901(d)(7) because "the application showed how interference would be avoided by demonstrating none could exist. Moreover, Exhibit H also complies with Section 21.902(a) by demonstrating that interference would be avoided due to the lack of other facilities." Benson's Petition at 2.

4. *Discussion.* The arguments presented by Benson are without merit. Prior to the filing of any MMDS applications, including Benson's, the Commission declared that each MMDS applicant had to submit, as part of its application, a specific technical interference protection showing for cochannel and adjacent channel stations.[1] To effectuate its decision, the Commission added 47 C.F.R. Sec. 21.901(d)(7) to the Commission's rules.[2] The Commission asked for the technical showing required by Section 21.901(d)(7) as a means of determining each MMDS applicant's awareness of the problems and technical competence to mitigate interference conflicts that might arise. *Advancom, Inc.*, (Comm. Car. Bur. Dec. 31, 1984). The consequences of failing to provide this demonstration was unequivocally stated:

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[3] The assignment of the four E channels to one station and the four F channels to another station "has the disadvantage that widespread adjacent channel interference could occur if the transmitters of the two operators are not colocated." Id. at 1264. "[T]he use of channels in one pair of an interleaved group [such as E-group] tends to preclude use of the other group [such as F-group] in the same area." Id. For this reason, the Commission emphasized that it would "require each applicant to include, as

those commenting on the MMDS reallocation proposal expressed the view that such operation was not technically feasible using existing MDS or ITFS equipment. Others expressed the view that such operations were feasible, but the stations had to be carefully engineered. Also, Section 21.901(d)(7) was adopted because the Commission anticipated that some authorized cochannel stations would be spaced more closely than ordinarily would be allowed. Closely-spaced cochannel stations can be successfully operated but require careful planning and engineering.[4]

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10. *Conclusion.* Having carefully considered all of the arguments and evidence submitted by Benson, we find that it was proper for the Division to return Benson's applications as unacceptable for filing, and reconsideration of that decision is not warranted. Accordingly, Marylan J. Benson's request for reconsideration and reinstatement of the above-referenced applications IS DENIED. This order is issued pursuant to 47 C.F.R. Sec 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

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part of its application, an analysis of the potential for adjacent channel interference with a non-colocated licensee operating on the interleaved channel group." Id. at 1247.

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Adopted: March 11, 1993: Released: March 19, 1993

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1. *Introduction.* Before the Bureau are petitions for reconsideration of the determination by the Domestic Facilities Division (Division) that the above-referenced applications of Donald E. Benson (Benson) to construct and operate Multichannel Multipoint Distribution Service (MMDS) stations on the E and F-group channels at the above-captioned locations were unacceptable for filing.

2. *Division Return.* The Division determined that Benson's applications were unacceptable for filing because each lacked the technical analysis required by 47 C.F.R. Sec. 21.901(d)(7). The omission of this information in Benson's applications rendered the applications incomplete and not in a "condition acceptable for filing." Therefore, Benson's applications were returned as unacceptable for filing, pursuant to Sec. 21.20(a) of the Rules.

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part of its application, an analysis of the potential for adjacent channel interference with a non-colocated licensee operating on the interleaved channel group." Id. at 1247.

[4] To mitigate the effects of the problem of "gridlock," the Commission decided to group MMDS applications for lottery, where possible, according to Metropolitan Statistical Areas (MSAs), Consolidated Metropolitan Statistical Areas (CMSAs), or New England Consolidated Metropolitan Areas (NECMAs) in which the MMDS transmitter sites were located. "Gridlock" is the situation in which a large number of applications are filed in multiple adjacent areas resulting in all the applications being considered mutually exclusive. Although this lottery grouping method eliminates the "gridlock" problem where there are statistical areas, it can result in some cochannel stations being spaced more closely than would be allowed by traditional rules for determining the potential for harmful interference. Id. at 1264.

[5] "In those situations where [statistical areas]... are so close that a single transmitter could produce a signal strong enough to cause harmful interference in both [statistical areas], we require that each applicant... detail what steps it will take to prevent blocking cochannel use in the adjacent" statistical area. Id. at 1264.

[6] See Amendment of Parts 1 and 21 of the Commission's Rules and Regulations Applicable to the Domestic Public Radio Services (Other than Maritime), 60 FCC 2d 549 (1976); see also Revision of Part 21 of The Commission's Rules, 2 FCC Rcd 5713 (1987).

[7] We reject Benson's contention that he should be permitted to file curative amendments and have his applications reinstated, *nunc pro tunc*, for further processing. We believe that the Division's initial return of the Benson applications as unacceptable for filing was correct, and thus, *nunc pro tunc* reinstatement is not justified.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-297

In the Matters of

Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service;	RM-7872; RM-7722
Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules;	
Suite 12 Group Petition for Pioneer's Preference;	PP-22
University of Texas - Pan American Petition for Reconsideration of Pioneer's Preference Request Denial	

ORDER

Adopted: March 12, 1993; Released: March 12, 1993

By the Deputy Chief, Common Carrier Bureau:

1. The Mobile Satellite Service Above 1 GHz Negotiated Rulemaking Committee ("Committee") has requested an extension of time to file comments in the captioned rulemaking proceeding. The present comment due date is March 16; the Committee requests an extension until April 16 for comments and a one-month delay in filing reply comments.

2. In support of its request, the Committee indicates that its report of recommendations to be used in the formulation of technical rules governing the provision of mobile satellite service using certain L-band and S-band frequencies will be available by April 16, 1993. The Committee states that at least one of the Commission's Mobile Satellite Service (MSS) applicants proposes to use the 28 GHz band for Earth-to-space links. This use would conflict with the proposed use discussed in the NPRM, argues the Committee, and therefore technical information regarding satellite proposals for the 28 GHz band should be available to the Commission.

3. The Committee's report should be made a part of the record in this proceeding, and upon its release, we shall include it. However, the Committee has not advanced any reasons for a general delay of the filing deadline for comments. The issue of coordination with satellite use of the 28 GHz band is only one of many issues to be addressed in this proceeding. If any party wishes to comment on the Committee's report as it affects satellite and LMDS use of the proposed band, we will consider their late-filed comments.

4. ACCORDINGLY, for the foregoing reasons, the request for extension of time filed by the Mobile Satellite Service Above 1 GHz Negotiated Rulemaking Committee IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Operations
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Section 208 Complaints
Alleging Violations of
the Commission's Rate of Return
Prescription for the 1987-1988
Monitoring Period

MEMORANDUM OPINION AND ORDER

Adopted: February 2, 1993; Released: March 15, 1993

By the Commission:

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I. INTRODUCTION

1. In this Memorandum Opinion and Order we find that the complainants in these consolidated Section 208 proceedings,[1] have has met their burden of establishing that the defendant local exchange carriers (LECs) have violated Section 201(b) of the Communications Act by earning in excess of the rate of return for interstate access services prescribed by the Commission for the period January 1, 1987 through December 31, 1988. In addition, we award monetary damages, plus interest computed at the relevant IRS rate, to those complainants who have successfully shown that they incurred actual damage as a consequence of defendants' violations.

II. BACKGROUND

2. The issues presented in these consolidated complaint proceedings are virtually identical to those presented by the complainant in *MCI "Telecommunication Corporation v. Pacific Northwest Bell Telephone Co.*,[2] In that proceeding, we held that LEC rates that produced earnings in excess of a Commission prescription were unjust and unreasonable within the meaning of Section 201(b) of the Communications Act (the "Act").[3] We also held that a complainant/customer is entitled to recover damages to the extent that it can show that it suffered actual damage as a consequence of such violations. Subsequently, in the damages phase of the proceeding, we held that MCI had properly shown that it had been harmed by paying the defendants' rates that produced the excessive earnings. We awarded the complainant monetary damages, plus interest computed at the IRS rate.[4]

3. A detailed accounting of the Commission's rate of return regulatory scheme as well as relevant Commission and court decisions is set forth in the *MCI Liability Order* and the *MCI Damages Order* [5] and will not be repeated at length here. However, a brief discussion of the development and implementation of the Commission's rate of return prescription is helpful to our analysis of the instant complaints.

4. Following the divestiture of the former Bell system and the concurrent development of the access charge sys-

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[1] The complainants, defendants and the acronyms used to identify them in this Order are identified in Appendix A to this Memorandum Opinion and Order. Due to the similarity of the issues and arguments raised by the various parties, the proceedings have been consolidated for disposition.

[2] MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co., *et al.*, 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990) (*MCI Reconsideration Order*) (jointly "*MCI Orders*"), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991) (per curiam). *See also*, American Telephone and Telegraph Co. v. Northwestern Bell Telephone Co., 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., et al. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam).

[3] Section 201(b), 47 U.S.C. § 201(b), provides that "[a]ll charges, practices, classifications, and regulations for and in connection with ... communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful."

[4] MCI Telecommunications Corporation v. Pacific Bell Telephone Company, FCC No. 93-70 (released February 8, 1993) (*MCI Damages Order*).

[5] *MCI Liability Order*, 5 FCC Rcd at 217-218 (1990); *MCI Damages Order* at paras. 2-3.

tem,[6] the Commission prescribed a rate ofreturn system for all eight entities that emerged after divestiture (i.e., AT&T and the seven Regional Bell Holding Companies) and approximately 1400 other LECs as well. In a broad rulemaking proceeding, the Commission adopted: (1) methodologies to be used to prescribe maximum rates of return; (2) procedures for represcribing rates of return on a regular basis; (3) a system of monitoring carriers' earnings; and (4) a requirement that overearnings be refunded, either directly to those who had paid rates that produced the overearnings, or pursuant to automatic, prospective adjustments to tariff rates.[7] For the 2-year time period at issue in the instant complaints, January 1, 1987 through December 31, 1988, LECs, including the defendants, were required to file rates calculated to earn a 12 percent rate of return for overall interstate access.[8] In accordance with the Commission's "buffer" policy, carriers were given notice that 12.25 percent would be the maximum allowable rate of return on overall interstate earnings and that 12.40 percent would be the maximum allowable rate of return for any access service category.[9] The buffer[10] would be used to determine whether the prescription had been violated.[11]

5. In January 1988, the U.S. Court of Appeals for the District of Columbia Circuit set aside the automatic refund mechanism as arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce."[12] The Court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate of return prescription."[13]

6. In February 1988, MCI filed formal complaints against a number of local exchange carriers, including some of the defendants in the instant proceeding, alleging violations of the Commission's rate of return prescription for the October 1, 1985 through December 31, 1986 monitoring period and requesting monetary damages. Many of the complainants filed similar complaints in September 1989, also seeking damages for alleged rate of return prescription violations for the initial 1985-1986 monitoring period. During the same time period, numerous similar complaints were filed by other interstate access customers alleging rate of return prescription violations for the initial 15-month monitoring period.[14] In January 1990, the Commission released its *MCI Liability Order* granting MCI's complaints and directing MCI to file supplemental complaints for damages. In 1990 and 1991, many of the complainants filed a second round of complaints against the defendants alleging violations of the Commission's prescription for the January 1, 1987 through December 31, 1988 monitoring period. It is the complaints alleging violations of the rate of return prescription for the 1987-1988 monitoring period that are the subject of this proceeding.

7. In January 1991, the Commission placed all pending rate of return complaints, including MCI's supplemental complaints for damages, in abeyance pending resolution of a related court remand in *Illinois Bell Tel. Co. v. FCC*.[15] Following the return of the proceedings to active status in December 1991 and January 1992[16] and the completion of discovery, the parties to the various proceedings were required to submit initial briefs and reply briefs setting forth their respective claims and arguments.[17]

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[6] The Commission has prescribed for all LECs, including the defendants, a methodology known as the "access charge system," which carriers are required to follow in tariffing their interstate services. The system determines, inter alia, the carriers' overall rate structure and the allocation of costs within that structure, and was in effect during the period covered by the complaints. The access charge system is codified in Part 69 of the Commission's rules. *See* 47 C.F.R. § 69.1 *et seq.* (1988). These rules were developed in a proceeding that was the subject of numerous challenges on appeal. With a few exceptions not relevant to the instant complaint proceedings, these appeals were denied by the D.C. Circuit. *See NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[7] *See* Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Carriers, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), (*Phase I Order*), *on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986) (*Phase I Reconsideration*); *on further reconsideration*, 2 FCC Rcd 190 (1987). *See also*, Procedures and Methodologies to Establish Reporting Requirements, CC Docket No. 86-127, FCC 86-514 (released Dec. 3, 1986), 52 Fed. Reg. 273 (Jan. 5 , 1987).

[8] *See* Authorized Rate of Return for the Interstate Access Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase III, FCC 86-354, 51 Fed. Reg. 32,920 (Sept. 17, 1986), *recon. denied*, 2 FCC Rcd 5636 (1987).

[9] 47 C.F.R. § 65.7004

[10] *See MCI Liability Order*, 5 FCC Rcd at 217:

> ... the Commission established both an authorized rate of return and a 'spread' or 'buffer' above that return for use in proceedings relating to the enforcement of the prescription. In other words, the authorized return would be employed in computing tariff rates; the spread, or buffer, would be used in combination with the authorized return 'to determine whether a rate of return prescription had been violated.' [footnote omitted.]

[11] *See Phase I Order*, 50 Fed. Reg. at 41,352 (para. 21).

[12] *American Telephone & Telegraph Co. v. FCC*, 836 F.2d 1386, 1390 (D.C. Cir. 1988) (*AT&T v. FCC*). For a detailed discussion of *AT&T v. FCC*, see *MCI Liability Order*, 5 FCC Rcd at 221-223.

[13] *AT&T v. FCC*, 836 F.2d at 1392.

[14] These additional complaints are being dealt with in separate Section 208 complaint proceedings.

[15] 911 F.2d 776 (D.C. Cir. 1990). *See, e.g.*, Americall Systems of Louisville v. Cincinnati Bell Telephone Company, *et al.*, 6 FCC Rcd 698 (Com.Car.Bur. 1991); First Phone of New England, Inc. v. Bell Telephone Company of Pennsylvania, *et al.*, 6 FCC Rcd 661 (Com.Car.Bur. 1991) (*Abeyance Orders*). The Commission acted on the remand in October 1991. *See* Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Decision on Remand, 7 FCC Rcd 296 (1991), *appeal docketed sub nom. Illinois Bell Telephone Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan.11, 1991). Some complainants filed applications for review (Applications) of the *Abeyance Orders*. Oppositions to the Applications were filed by some of the defendants. Some complainants filed replies. In December 1991 and January 1992, the Enforcement Division of the Common Carrier Bureau released orders that reactivated the instant cases. That action makes the Applications moot and, accordingly, we dismiss the Applications.

[16] *See, e.g.*, One Call Communications, Inc. v. Indiana Bell Telephone Company, *et al.*, 7 FCC Rcd 404 (Com.Car.Bur. 1991).

[17] In the instant proceedings, the complainants and the defendants all filed briefs and reply briefs pursuant to the schedules established by the Bureau between June and September, 1992. The arguments and claims made by the various complainants

III. DISCUSSION

A. Liability For Damages

1. Contentions of the Parties

8. The complainants allege that the rates they paid for certain of the defendants' interstate access services during the period from January 1, 1987 through December 31, 1988 were unjust and unreasonable in violation of Section 201(b) of the Act. The complainants support their allegations with evidence taken from reports filed with the Commission by the defendants for the two-year period at issue that show that defendants achieved earnings in excess of the Commission's prescribed rate of return in one or more of the three interstate access categories established for the purpose of enforcing that rate of return prescription.[18]

9. The complainants request that the Commission declare that the defendants' charges for the period from January 1, 1987 through December 31, 1988 are in violation of the rate of return prescription and Section 201(b) of the Act, and order the defendants to pay damages to complainants equal to the difference between the amount actually paid by complainants for interstate access service during the period and the amount that complainants would have paid if the defendants' charges earned no more than the maximum allowable rate of return, plus interest. A number of the complainants also request that the Commission direct the defendants to pay attorney's fees and costs associated with the preparation and filing of the complaints.[19]

10. The defendants advance a number of arguments to support their claims that they cannot be held liable for damages based solely on the fact that their rates produced earnings in excess of the Commission's prescribed rate of return. For the most part, these arguments were fully considered and rejected by the Commission in the *MCI Liability Order*.[20] We briefly discuss the defendants' arguments, in turn, below.

11. The defendants first argue that the complainants have failed to state a cause of action under Section 208 of the Act. Defendants contend that earning in excess of a rate of return prescription is not a violation of the Act or any valid Commission rule or order; and even if such action could be considered a violation, it could occur only if the return was exceeded by the company "overall."[21] To bolster this argument, the defendants argue in unison that the complaints are barred by the D.C. Circuit's decision in *AT&T v. FCC* and a later decision by the Sixth Circuit in *Ohio Bell v. FCC*.[22] The defendants contend that Precasting what amounts to a "refund" as a "damage award" does not cure the deficiencies the court found with a procedure which effectively requires the automatic refund of carrier overearnings but does not permit carriers to recoup earning shortfalls. The defendants argue that consistent with *AT&T v. FCC*, the Commission must consider a carrier's

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and defendants are, for the most part, identical in their essentials. For convenience and clarity, we refer to the complainants' arguments or the defendants' arguments, as the case may be, as if they were part of the same pleadings. To the extent that individual complainants or defendants make unique or separate arguments, we address them accordingly. As a preliminary matter, we note that USWC has stated that it filed its briefs directly with the Commission because it could find no order delegating damages authority to the Bureau. In addition, USWC formally objects if the Bureau is deciding these cases under delegated authority because it contends that the Bureau has been performing investigative and prosecutorial functions in these proceedings and cannot, under Section 554(d) of the Administrative Procedure Act (5 U.S.C. § 554(d)), act as decision maker herein. *See, e.g.*, USWC Br., File Nos. E-90-330-332, at 2, n.7. While we agree with USWC that the damages issue must be decided by the Commission, 47 U.S.C. § 155(c)(1), the Bureau may deal with interlocutory matters such as discovery issues. We also disagree with USWC's characterization of the Bureau's activities regarding these complaint proceedings. The Bureau has at all times been acting as the "decision maker" and not as an "investigator" or "prosecutor."

[18] The interstate access service categories are special access, common line, and switched traffic sensitive. *See* 47 C.F.R. § 65.702. The rates of return reported for the various defendants in their Forms 492 for the 1987-1988 monitoring period are set forth in Appendix B to this Memorandum Opinion and Order.

[19] These complainants include: American Network Exchange, File Nos. E-91-135, E-91-136--139, E-91-149.

[20] *MCI Liability Order*, 5 FCC Rcd at 220-225. The Commission held that the defendants had violated the Act by earning in excess of a valid rate of return prescription, thereby making their rates unlawful under Section 201(b) of the Act and themselves liable for such damages as the complainant, MCI, could demonstrate in a supplemental complaint proceeding. In effect, we have previously determined that defendants rates are unjust and unreasonable to the extent that they produced earnings in excess of prescribed levels. To pursue a claim for damages in these proceedings, the complainants need only show that they took service from defendants in the access service categories in which defendants overearned and set forth the manner and extent to which they were damaged as a result of paying the defendants' unlawfully high rates.

[21] *See, e.g.*, Bell Atlantic Brief, File No. E-91-125, at 9-10; USWC Brief, File Nos. E-91-140--141, at 8-10; Ameritech Reply Brief, File Nos. E-90-258--260, at 7-9.

[22] 949 F.2d 864 (6th Cir. 1991) (*Ohio Bell*). In *AT&T v. FCC*, the court invalidated the Commission's procedure designed to enforce its rate of return prescriptions through the automatic refund of carrier overearnings to customers. In *Ohio Bell*, the court, relying on the *AT&T v. FCC*, vacated a Commission order which had directed refunds of LEC earnings in excess of the authorized rate of return for the special access category over a period of years in the context of a strategic pricing investigation. *Ohio Bell*, 949 F.2d at 874. The Sixth Circuit placed considerable weight on the statement in *AT&T v. FCC* indicating that the Commission viewed its rate of return prescription as both minimum and maximum ceilings on carrier earnings. 949 F.2d at 878, citing *AT&T v. FCC*, 836 F.2d at 1390. The Commission, however, had since clarified that it does not view a rate of return prescription as both a minimum and maximum:

> [o]ur accumulated experience with rate of return prescriptions, and our review of the cost of capital evidence in this proceeding, convince us that there is no such point. * * * We believe there is a substantial gap between an earnings level that is fully adequate to assure attraction of capital on favorable terms, and an earnings level which, if sustained over time, would be confiscatory.

Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507, 7532 (1990); *appeal docketed sub nom. Illinois Bell Telephone Co., et al. v. FCC*, No. 90-1020 (D.C. Cir. Jan. 11, 1991).

overall earnings in determining whether a carrier's earnings level are in violation of the Act. The defendants maintain that to the extent that their earnings for overall interstate access services did not exceed the allowed 12.25 percent, there can be no violation of the Act regardless of the earnings realized in individual access service categories. The defendants add that the court's decision in *Ohio Bell*, issued after the release of the *MCI Liability Order*, reaffirms the proposition established in *AT&T v. FCC* that the Commission cannot entertain complaints for damages based on category-level interstate access overearnings. The defendants maintain that these propositions are not confined to the Commission's ratemaking activities under Sections 204-205 of the Act but are equally applicable when the Commission decides private complaints for damages under Section 208 of the Act.

12. Defendants next contend that the complaints are barred because they seek, in effect, a remission of tariffed charges in contravention of Section 203(c) of the Act. A number of defendants further contend that any Commission order requiring a carrier to make refunds solely because the carrier has exceeded the authorized rate of return would constitute unlawful retroactive ratemaking.[23] The USWC defendants, for example, maintain that rates charged in conformity with a lawfully filed tariff cannot then be found to be unjust and unreasonable merely because they later proved to be too profitable.[24] According to the USWC defendants, earnings in excess of a prescribed rate of return cannot establish a violation of the Act because the Act "never mentions 'excessive returns' -- it requires a complainant to demonstrate a violation of the Act and the Act only speaks of 'rates' not 'returns.'"[25]

13. The Ameritech Companies make the additional claim that the complaints are barred because the rates at issue were prescribed by the Commission and cannot be subject to refunds or damage claims.[26]

14. Each of the defendants argues that complainants' claims are barred in whole or in part by Section 415 of the Act, which establishes a two-year statute of limitations on the filing of complaints.[27] According to a number of the defendants, Section 415 bars the recovery of any damages where the complaint was filed more than two years after the occurrence of the alleged overearning.[28]

2. Discussion

15. We have carefully examined the record before us and conclude that the defendants, many of whom were defendants in the MCI complaint proceedings, have cited no facts and have made no arguments here that would warrant a ruling contrary to the *MCI Orders*.

16. *Failure to State a Cause of Action:* In the *MCI Liability Order*, we rejected identical claims made by the defendants that earnings in excess of a prescribed rate of return do not establish a cause of action under the Act. We held that *AT&T v. FCC*, the principal case authority relied upon by the defendants, establishes no precedent that bars an individual complainant from seeking a remedy under Section 208 of the Act for damages based on a carrier's reported overearnings.[29] Specifically, we stated that

> we are not persuaded by the defendants' claims that earning in excess of a prescribed rate of return does not violate that Act or, if it does, that the Commission *is required* to take a carrier's underearnings as well as its overearnings into account in determining whether a violation has occurred.
>
> * * * * * * * *
>
> We find that a valid prescription bound the defendants to a maximum earnings limitation, and the defendants admit that they earned in excess of that amount during the period in question.[30]

We found further that *AT&T v. FCC* did not govern Section 208 complaint proceedings. The Commission has the authority to order a carrier to pay damages if a complainant meets the burden of establishing both a violation of the Act and the actual injury.[31]

17. *Retroactive Ratemaking.* We also held in the *MCI Liability Order* that enforcement of a rate of return prescription is not retroactive ratemaking because the obligation being enforced was set prospectively when the prescription was adopted.[32] Defendants have not persuaded us to alter our decision. We have also rejected the contention that rates charged in conformity with a lawfully filed tariff cannot be unjust and unreasonable.[33] As we stated in the *MCI Liability Order*, "legally effective, carrier-initiated

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[23] *See, e.g.*, Bell Atlantic Brief, File No. E-91-075--081, at 9-10. The defendants argue specifically that under a recent court decision, *Illinois Bell v. FCC*, 966 F.2d 1478 (D.C. Cir. 1992) (*Illinois Bell*), the Commission may only engage in prospective ratemaking when the investigative and accounting requirements of § 204(a) have not been met. We reject defendant's claim that the decision in *Illinois Bell* somehow leaves this Commission only with Section 205 authority in the face of a violation of our rate of return prescription. As we explained in the *MCI Damages Order*, *Illinois Bell* addresses the Commission's authority under Section 204, not Section 208. *See MCI Damages Order* at 27. The defendants' claim that the *Illinois Bell* decision deprives the Commission of authority to award damages for violations of a valid rate of return prescription has no merit.

[24] *See, e.g.*, Ameritech Brief, File Nos. E-90-258--260, at 13-15.

[25] *See* USWC Brief, File Nos. E-91-140--141, at 10.

[26] *See* Ameritech Brief, File Nos. E-91-010--012 and -013, at 13-14.

[27] Section 415 provides, in pertinent part, that "[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after...." 47 U.S.C. § 415(b) (1982). The term "overcharges" is defined in Section 415 "to mean charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission." 47 U.S.C. § 415(g) (1982).

[28] *See, e.g.*, SW Bell Br., File No. E-90-232, at 7-9; Ameritech Companies Br., File No. E-91-136, at 16-17.

[29] *MCI Liability Order*, 5 FCC Rcd at 222-3.

[30] *Id.*, 5 FCC Rcd at 223 [emphasis in the original; footnote omitted].

[31] *Id.*

[32] *Id.* at 222.

[33] *Id.*

tariffs can always be challenged as unreasonable and unlawful."[34] The issue raised by these complaints is not the lawfulness of high profits in the abstract, but the lawfulness of profits in excess of a prescription. Accordingly we hold that, taking into account the buffer, profits in excess of a prescription are unjust and unreasonable.

18. *AT&T v. FCC and Ohio Bell:* The defendants' claims that *AT&T v. FCC* and *Ohio Bell* compel us to dismiss the complaints have no merit. As we emphasized in the *MCI Liability Order* and reaffirmed in the *MCI Damages Order,* automatic refunds and refunds ordered under Section 204 of the Act are different from individual actions for damages under Section 208. Unlike the automatic refund mechanism in *AT&T v. FCC* or the refund procedure in *Ohio Bell,* both of which resulted from rulemaking proceedings initiated at the Commission's discretion, individual actions for damages under Section 208 are initiated by private parties seeking damages for injuries to themselves; those private parties have the burden of establishing both a violation of the Act and actual injury.[35] The courts in *AT&T v. FCC* and *Ohio Bell* did not discuss private complaints for damages; they did not invalidate private actions for damages; and their holdings are not applicable to the different separately authorized complaint procedure set forth in Sections 206-209. Accordingly, those decisions do not require us to depart from our holding in the *MCI Liability Order* that defendants have violated the Communications Act by earning in excess of a valid rate of return prescription, thereby making their rates unjust and unreasonable under Section 201 of the Communications Act and themselves liable for damages to the extent a complainant/customer can establish that it was damaged as a result of the violation.[36]

19. *Rates Prescribed by the Commission.* The Ameritech Companies' argument that the complaints are barred because the rates in effect during the period in question were prescribed by the Commission was discussed at length and rejected in the *MCI Liability Order* and requires no further discussion here.[37] The Ameritech Companies have raised no new issues or arguments that would persuade us to depart from our holdings.

20. *Statute of Limitations:* We held in the *MCI Liability Order* that the date a carrier files its final rate of return monitoring report is dispositive with regard to the date a complainant discovers the right or wrong or the facts on which such knowledge is chargeable as a matter of law.[38] Defendants have made no argument that persuades us to alter this determination. Accordingly, Section 415 poses no bar to the instant complaints.

B. Damages and Interest Claims

21. The complainants' damages claims rest primarily on the contention that the proper measure of damages incurred as a result of the defendants' rate of return prescription violations is the difference between the amounts the complainants actually paid the defendants for interstate access services during the January 1, 1987 through December 31, 1988 monitoring period and the amount they each would have paid if the defendants' rates produced earnings that did not exceed the Commission's prescription. The defendants, however, have raised a number of challenges to the complainants' damages claims, including a number of arguments that were previously considered and rejected by the Commission in the *MCI Liability Order* and the *MCI Damages Order.* We address complainants' and defendants' contentions below.

1. Damages

a. Contentions of the Parties

22. As stated above, the complainants contend that the proper measure of the damages they suffered as a result of defendants' violations is the difference between the amounts they each paid defendants for interstate access services during the January 1, 1987 through December 31, 1988 period and the amounts they would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[39] The damages amounts claimed by individual complainants from the various defendants based on this measure are set forth in Appendix C to this Memorandum Opinion and Order. Complainants contend that they are entitled to interest on any damages awarded.

23. In the *Discovery Orders,* the Bureau stated that it tended to agree, in principle, with the damages measure advocated by complainants.[40] The Bureau was not persuaded on the record before it, however, that a damages determination based solely on such a measure would necessarily reflect actual damages incurred by the complainants.[41] The defendants were invited to submit evidence that could serve to mitigate or otherwise reduce complainants' damages claims. Specifically, the Bureau stated that evidence demonstrating that a particular complainant's share

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[34] *Id.* at 222, quoting *Arizona Grocery v. Atchison, T & S.F.R. Co.,* 284 U.S. 370, 384 (1932).

[35] *See MCI Liability Order,* 5 FCC Rcd at 222-23, para. 55.

[36] *Id.,* 5 FCC Rcd at 226, para. 86.

[37] *See id.,* 5 FCC Rcd at 223-224.

[38] In the *MCI Liability Order* we stated:

> the defendants filed the rate of return monitoring reports which...were developed by the Commission for several purposes, including making information about carrier earnings public[ly] available. Moreover, the monitoring reports relied on by MCI in its complaints were specifically designated by the Commission as a "final" and conclusively binding determination of a carrier's earnings.

5 FCC Rcd at 225. We note further that, we have held that Section 415(e) is inapplicable to the type of complaints we deal with here. Section 415(e) concerns a carrier's liability to its customers for failure to transmit a message in accordance with its common carrier obligations. The instant complaints deal with the lawfulness of defendants' rates, not defendants' transmissions or obligations to transmit messages properly. *See MCI Reconsideration Order,* 5 FCC Rcd at 3464.

[39] MCI Brief, File Nos. E-90-423, -442--443, at 5-9, citing *Louisville & Nashville R. Co. v. Sloss-Sheffield Steel & Iron Co.,* 269 U.S. 217 (1925); *Southern Pacific Co. v. Darnell-Taenzer Co.,* 245 U.S. 531 (1918); *Adams v. Mills,* 286 U.S. 397 (1932); *Aeronautical Radio, Inc. v. FCC,* 642 F.2d 1221 (D.C. Cir. 1980), *cert. denied,* 451 U.S. 920 (1981) (*ARINC*).

[40] *See, e.g., Discovery Order,* 7 FCC Rcd at 4167, para. 6.

[41] *Id.*

of excessive earnings realized by a defendant in a given access category could be offset or otherwise reduced due to facts and circumstances surrounding the complainant's purchase of other interstate access services from such defendant for the relevant monitoring period might be relevant.[42]

24. In their briefs and reply briefs, the defendants challenge the complainants' damages claims on a number of grounds, raising several arguments that were previously considered and rejected by the Commission in the *MCI Liability Order* and the *MCI Damages Order*. Defendants contend that by simply basing their damages claims on a calculation of their prorated share of each of the defendants' category-level overearnings, the complainants ask the Commission to award them damages in the same amounts they would have received under the automatic refund rule invalidated by the court in *AT&T v. FCC*.[43] The defendants maintain that such a result is expressly precluded by *AT&T v. FCC* as well as the court's decision in *Ohio Bell*. A number of the defendants add that the decision of the court in *Illinois Bell* also establishes that the Commission has no authority to award refunds if it has not first suspended the applicable rates under Section 204 of the Act.[44] These defendants argue that because the Commission never issued an accounting order pursuant to Section 204, the Commission "has no authority to order refunds of those rates, regardless of whether it labels them 'refunds' or 'damages'"[45]

25. Defendants next contend that, even if *AT&T v. FCC* and *Ohio Bell* do not preclude an award of damages, the complainants' damages claims still fail because the complaints do not establish a valid cause of action. According to defendants, to pursue a damages claim, the complainants must first show that the defendants charged unjust and unreasonable rates for interstate access services during the period in question, not that defendants' rates produced excessive returns in individual service categories.[46] Moreover, defendants argue, Section 206 of the Act[47] requires the complainants to prove injury, causation, and the specific amount of damages sought, in addition to establishing a violation of the Act.[48] Defendants maintain that by simply referencing defendants' earned rates of return for individual access service categories, the complainants have not only failed to allege any facts that would establish that defendants' rates were unjust and unreasonable during the period in question but have also failed to show that they sustained actual damage as a result of those rates.[49]

26. A number of the defendants also contend that an award of damages to complainants based on carrier overearnings is inappropriate for equitable and policy reasons.[50] These defendants argue that complainants are actually seeking restitution or a refund of tariffed charges, not damages. They argue that regardless of how complainants characterize the relief they seek, any form of refund or restitution to complainants would be contrary to the public interest.[51]

27. Some defendants further contend that complainants' claims for damages are flawed because they simply assume that lower rates would have produced lower earnings and offer no probative evidence to show what a reasonable rate would have been or to otherwise support their damages claims.[52] The defendants claim, in effect, that complainants would receive windfalls if they have passed the "overcharges" on to their customers and are now awarded damages.[53] Pacific Bell argues, for example, that had its access charges to complainants been lower in 1987-1988, it is almost certain that the complainants' rates to their customers would have been lower. The defendants maintain that, should the Commission award damages to complainants, it should order complainants to pass the damages through to their end users in the form of a rate reduction.[54]

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[42] *Id.*

[43] *See, e.g.*, Ameritech Brief, File Nos. E-91-221--223, at 13-16. The defendants contend that *Ohio Bell* makes clear that it was the end result of the automatic refund mechanism, not the mechanism itself, that was unlawful.

[44] 966 F.2d at 1481.

[45] *See, e.g.*, Bell Atlantic Brief, File No. E-90-444, at 6. Bell Atlantic further argues that the Commission can no longer rely on *New England Telephone and Telegraph Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), *cert. denied*, 109 S.Ct 1942 (1989), to support a refund of overearnings in light of *Ohio Bell* and *Illinois Bell*.

[46] The defendants argue that complainants must specify identifiable rates that they paid that was too high or too low. *See, e.g.*, Ameritech Brief, File Nos. E-90-439--440, 91-019--020, at 11-13. These defendants cite to a 1970 circuit court decision to support the claim that where retroactive relief is ordered for rates paid pursuant to a tariff that is subsequently found unjust and unreasonable, the Commission must determine what a just and reasonable rate is. *Id.*, citing to *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 232 (8th Cir. 1970) (*Middlewest*), *cert. denied*, 402 U.S. 999 (1971). As we determined in the *MCI Damages Order*, the defendants' reliance on *Middlewest* is misplaced. *MCI Damages Order* at n.56.

[47] *See* 47 U.S.C. § 206.

[48] *See, e.g.*, Bell Atlantic Brief, File Nos. E-90-317--323, at 7; SW Bell Brief, File No. E-91-057, at 5-6.

[49] *See, e.g.*, Bell Atlantic Brief, File Nos. E-90-429--435, at 9-13. The defendants contend that the principle that complainants must still prove they were damaged and in what amount was established by the Supreme Court in *Southern Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 454-55 (1979) (*Seaboard*), in construing relevant sections of the Interstate Commerce Act. The Court stated:

> [O]ur sole concern is the Commission's decision not to investigate under § 15(8)(a) [204], a decision that has only two final consequences. First, the burden of proof with regard to *reasonableness* is placed on the shipper under § 13(1) [208] rather than on the carrier, who would have borne it in a § 15(8)(a) [204] proceeding. (With respect to all other aspects of lawfulness, however, the burden is borne by the shipper in both proceedings.) Second, the shipper's relief, if unlawfulness is proved, is limited under § 13(1) [208] to actual damages rather than the full refund of overcharges available under § 15(8)(a) [204].

The defendants contend that this ruling has been found applicable to proceedings under the Communications Act. *See ARINC*, 642 F.2d at 1235 n.35. Here too, as we determined in the *MCI Damages Order*, the defendants' reliance on case precedent is misplaced. *MCI Damages Order* at n.59.

[50] *See, e.g.*, Bell Atlantic Brief, File Nos. E-90-317--323, at 7; SW Bell Brief, File No. 90-266, at 6.

[51] *See, e.g.*, Bell Atlantic Brief, File Nos. 90-203--206, at 13-19.

[52] *See, e.g., id.*, at 7-8; SW Bell Brief, File No. 90-266, at 5.

[53] *See, e.g.*, SW Bell Brief, File No. E-90-266, at 5-7.

[54] *See, e.g.*, Bell Atlantic Brief, File No. E-91-125, at 7-8.

28. The defendants argue in unison that even if the Commission determines that damages are lawful and appropriate, any damages award to complainants based on overearnings must be reduced to the extent that complainants purchased services from defendants in other access categories that produced underearnings. A number of defendants further contend that the Commission must take into account complainants' purchase of access services from defendants in the initial 1985-1986 monitoring period in assessing complainants' damages claims.[55] The defendants argue that to the extent that complainants benefitted from low rates during that initial period, their damages for subsequent 1987-1988 overearnings should be reduced accordingly.[56] The defendants argue that without taking into account substantial benefits realized by complainants by purchasing services at unreasonably low rates, complainants would receive a windfall profit that would be inconsistent with sound principles of equity.

29. Finally, defendant CBT claims that its procedural rights have been unduly restricted by the Commission in handling the complaints against it. According to CBT, the Commission allowed the complainants to maintain their actions even though they failed to present "'evidence that will identify, with reasonable certainty, the amounts of damages for which recovery is sought'" as required by Section 1.722 of the Commission's rules.[57] CBT further contends that the Bureau's discovery orders were not in accordance with any of its rules and were unreasonable in that the Bureau *sua sponte* ruled certain discovery relevant without affording CBT the opportunity to object and set unreasonable timetables for the completion of discovery. CBT maintains that while the Commission has the discretion to waive its rules for good cause, the Bureau has failed to acknowledge that it waived its rules, let alone establish good cause.[58]

30. In responsive pleadings, the complainants argue that the defendants' threshold arguments regarding the effect of the court's ruling in *AT&T v. FCC* have largely been rejected or precluded by the *MCI Liability Order*. The complainants claim that any so-called similarities between their damages complaints and the automatic refund mechanism invalidated by the court do not transform the private complaint remedy under Section 208 of the Act into a public enforcement refund remedy subject to entirely different standards and requirements as alleged by the defendants. The complainants add that the defendants' claims that they have failed to allege and prove violations of the Act and actual damage as a result of those violations are unfounded. The complainants maintain that they have successfully shown injury and causation arising from their payment of excessive rates for services purchased from defendants during the relevant period. The complainants stress that the defendants do not dispute that complainants were charged rates that produced earnings in excess of the Commission's prescribed rate of return. The complainants assert that their damages are the excessive charges that they paid.

31. A number of the complainants further contend that the defendants' equitable arguments are relevant only to the Commission's public enforcement remedies and not to individual complaints for damages because the Commission has no discretion in the award of damages under Sections 206-209 of the Act. These complainants assert that equitable arguments regarding the failure of a complainant to flow-through damages it might recover are not germane to private complaint actions and cannot be raised as a defense against an award of damages based on a proven violation of the Act. These complainants reiterate that their claims are actions for damages under Sections 206-209 of the Act, not requests for restitution or refunds.

32. Some complainants also contend that the defendants' offset claims should be rejected because the Commission has already held that cross-subsidies between access service categories are impermissible. In addition, some complainants contend that offsets are in the nature of counterclaims by the defendant carriers and as such, are not within the Commission's jurisdiction because they would involve the determination of a carrier's rights against a customer.[59] These complainants add that offsets would violate the filed-rate doctrine because the defendants would, in effect, be allowed to recoup undercharges through retroactive rate adjustments as well as discriminate against customers against whom such offsets are allowed.

b. Discussion

33. *AT&T v. FCC and Ohio Bell:* We turn first to the defendants' claims that the holdings in *AT&T v. FCC* and *Ohio Bell* control these proceedings and bar awards of damages to complainants. We find these arguments to be without merit for the reasons stated in both the *MCI Liability Order* and the *MCI Damages Order*. In our discussion of liability in Section III.A. above, we again emphasized that the court in *AT&T v. FCC* explicitly acknowledged the Commission's authority to order a carrier to disgorge earnings in excess of a rate of return prescription,[60] finding only the remedy component of the Commission's rate of return prescription (the automatic refund mechanism) to be unlawful.[61] More to the point, we emphasized that "the [*AT&T v. FCC*] opinion does not address Section 208 complaint proceedings nor purport to alter the statutory scheme of the Act or the remedies Congress established therein."[62] Similarly, the *Ohio Bell* decision, which relied in part on the reasoning of *AT&T v. FCC*, does not address the Commission's authority to award damages in private complaint actions under Section 208 of the Act. *Ohio Bell* follows *AT&T v. FCC;* it does not expand upon its holding.

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[55] *See, e.g.*, SW Bell Brief, File No. E-91-057, at 6-7.

[56] *Id.*

[57] *See, e.g.*, CBT Brief, File No. E-90-423, at 33, citing 47 C.F.R. § 1.722.

[58] *See id.* at 33-34.

[59] *See, e.g.*, Telecom*USA Reply Brief, File Nos. E-91-176--178 at 22-23, citing Thornell Barnes Co. v. Illinois Bell Telephone Co., 1 FCC 2d 1247, 1275; Illinois Bell Telephone Co. v. AT&T, 4 FCC Rcd 5628, 5270 (1989), *recon. denied*, 4 FCC Rcd 7759 (1989).

[60] *AT&T v. FCC*, 836 F.2d at 1392 ("Thus, as we previously have concluded, the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate of return prescription").

[61] Indeed, the court in *Ohio Bell* recognized the continuing efficacy of our rate of return framework. *See* 949 F.2d at 868.

[62] *MCI Liability Order*, 5 FCC Rcd at 223, para. 56.

34. We also reject defendants' contention that the court's decision in *Illinois Bell* leaves this Commission only with Section 205 authority to address violations of our rate of return prescription. In *Illinois Bell*, the court found that the Commission had ordered a refund under Section 204(a) of the Act without having issued a suspension order. The sole issue presented for resolution by the court was the difference in interpretation by the Commission and the petitioning parties of the Commission's authority under Section 204.[63] The court did not address individual complaint remedies, but merely held that the Commission is not authorized to order refunds under Section 204 without first having issued a suspension order, and that in doing so it must have acted under Section 205, which provides for prospective relief only.[64]

35. *Section 201(b) of the Act:* The defendants' contentions that the complainants' damages claims must be dismissed because the complainants have failed to prove defendants' rates were unjust and unreasonable within the meaning of Section 201(b) of the Act have no merit. In addressing liability above, we held that the complainant met its burden of proof by establishing that the defendants violated our rate of return prescription.[65] Accordingly, the question before addressing the parties' damages claims is not whether defendants' rates were unjust and unreasonable; rather the question now is whether the complainants suffered any measurable damage as a consequence of paying rates previously determined by the Commission to be unlawful under Section 201(b).

36. The defendants' further claim that even if complainants have sustained their burdens and shown that defendants' rates were unjust and unreasonable, their damages claims must still fail because judicial precedent compels complainants to establish what a just and reasonable rate would have been as a prerequisite to recovering damages is also unavailing. This argument was previously considered and rejected in the *MCI Damages Order*. We emphasized in that decision the Commission's authority to prescribe and enforce carriers' rates of return.[66] We also pointed out that the issue in these rate of return complaint proceedings is not whether individual rates are unlawful, but whether cumulative rates that produced earnings over and above a prescribed rate of return are unjust and unreasonable.[67] Accordingly, we held that the Bureau had properly determined in the *Discovery Order* that it is appropriate, in measuring the damage caused by defendants' rate of return violations, to look at the difference between the amount complainants paid for defendants' interstate access services and the amount they would have paid if defendants had charged rates that produced returns within the Commission's prescribed levels.[68] Moreover, in emphasizing the Commission's authority under the Act to prescribe and enforce a carriers' rates of return, we stated in the *MCI Liability Order* that

> [i]t does not disturb the balance of ratepayer and shareholder interests embodied in the Act to award damages to customers who demonstrate that they were injured by paying rates that resulted in a carrier earning in excess of its prescribed return. Even when a carrier operates under a prescription of a rate of return for broad categories, the carrier retains substantial flexibility in formulating rates. Carriers are permitted to make mid-course corrections if their actual return deviates from the authorized return. If actual earnings are higher than the authorized return, a carrier can file reductions and thereby avoid the risk of being ordered to pay damages. If earnings are below the authorized return, a carrier can file rate increases. Defendants had ample notice of our rules, which were developed in notice and comment rule making proceedings in which all of them participated, as well as the level of the prescription for each category. As a general matter, it would be inequitable to permit defendants, who were in the best position to set their rates at lawful levels in the first place, and who later had opportunities to correct those rates, to avoid responsibility for those unlawful rates, at the expense of their customers.[69]

37. With some exceptions,[70] the complainants have shown that they purchased services from defendants at rates that produced earnings over and above the defendants' prescribed levels. The defendants, faced with the prospect of damages for violations of a binding rate of return prescription, cannot so readily disavow the substantial flexibility afforded carriers to achieve their authorized rate of return. In effect, the defendants would have us require the complainants to do what defendants were neither required nor apparently able to do, that is establish the precise rates required to bring defendants' earnings within authorized levels for each of their interstate access service categories. The defendants ask too much. The Commission's rate of return prescription, although it afforded defendants considerable leeway in setting their rates, bound the defendants to a maximum earnings limitation. We previously determined in the *MCI Liability Order* that a violation of such a

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[63] *Illinois Bell*, 966 F.2d at 1481.

[64] *Id.* at 1483. The court stated

> We conclude that when the FCC investigates and remedies an unreasonable rate which it has theretofore permitted to become fully effective without a suspension order, it acts under § 205, not § 204. We further conclude that the Commission has no authority under § 205 to order the refunds contemplated only under § 204.

Id. The court clearly did not limit or even address this Commission's authority to order damages in a Section 208 proceeding.

[65] In the *MCI Liability Order*, we held that the complainant therein could prove that defendants' rates were unjust and unreasonable by proving that the defendants violated our rate of return prescription. *See MCI Liability Order*, 5 FCC Rcd at 226.

[66] For a full discussion of the Commission's authority to prescribe and enforce carriers' rates of return, *see MCI Liability Order*, 5 FCC Rcd 222-223.

[67] *MCI Damages Order* at para. 29.

[68] *Id.*

[69] *MCI Liability Order*, 5 FCC Rcd at 223, para. 59 [footnotes omitted].

[70] A number of complainants have failed to establish with any degree of certainty that they in fact purchased access services from any of the defendants during the period in question. These complainants are identified in Appendix C as having a claim for " damages against the named defendants. In the absence of such showing, we find that these complainants have failed to sustain damages claims.

prescription constitutes a violation of the Act for which damages may lie. It is therefore appropriate and consistent with the Commission's rate of return regulatory scheme to inquire as to earnings in excess of prescribed levels as a starting point for assessing the complainants' damages claims.

38. *Damages and Offsets:* The defendants' arguments are devoted primarily to attempting to persuade the Commission that complainants' damages claims are really claims for restitution or refunds governed by equitable or public policy considerations. These considerations, according to defendants, militate against any award of damages to complainants based on excessive earnings. The defendants argue, in effect, that the damages complainants seek are equivalent to refunds that would have been required under the refund mechanism invalidated by the court in *AT&T v. FCC*. We do not agree. We are concerned here with determining whether a particular customer, which has availed itself of a statutory complaint remedy under Title II of the Act, has sustained any measurable damage that can be traced to defendants' violations of the Act. Although a damages award under Section 208 of the Act might well be equal or substantially similar to a refund ordered under Section 204 of the Act,[71] this does not transform a private complaint action into a public enforcement proceeding subject to broad public interest considerations.

39. Consistent with our decisions in the *MCI Damages Order*, we find defendants' arguments with respect to "passing-on" to be equally unavailing. In rejecting this same argument, we said, "[w]hether [complainant] passed on the overcharges or absorbed them does not alter the fact that the defendants overcharged [complainant] in violation of a binding rate of return prescription and must answer for such violations."[72] The issue is not what complainants have done in response to paying excessive rates, but whether complainants have been damaged as a result of these excessive rates.

40. Nor can we accept the defendants' related claim that we should require complainants to flow through any damages it may receive to its end user customers. Sections 206-209 of the Act give private parties the right to file complaints challenging the acts or omissions of carriers and to recover monetary damages resulting from such acts or omissions. Complainants, however, are charged, as complainants are in the instant cases, with the burden of establishing violations of the Act or Commission rule or order and the amount or extent of damage suffered as a consequence of such violations. Accepting defendants' flow through argument would, in effect, transform complainants' complaints into class action suits on behalf of its customers, a result neither expressly contemplated by nor consistent with the private remedy created under Sections 206-209 of the Act.

41. We also reject the defendants' other equitable arguments regarding impermissible windfall profits to complainants if damages are awarded. The defendants' arguments in this regard, along with the numerous Commission andjudicial precedents relied upon by the parties, were addressed in detail in the *MCI Damages Order* [73] and require no further discussion here.

42. In addition, we reject defendants' argument that we should allow defendants to offset complainants' damages claims with underearnings that may be attributable to complainants outside the 1987-1988 monitoring period. Defendants have provided no support or rationale for their contention that we should take into account complainants' purchases of interstate access services outside the relevant monitoring period in assessing the damages incurred by complainants as a result of paying defendants' 1987-1988 rates.

43. We do find, however, that certain of the defendants have made persuasive claims for offsets based on the complainants' purchases of access services in categories in which the defendants realized earning shortfalls during the period in question. At the outset, we note that we have previously rejected the defendants' claims that the Commission is required to take into account a carrier's interstate access underearnings as well as its overearnings in determining whether a violation of the Act has occurred sufficient to sustain a Section 208 complaint.[74] We also note, however, that we have similarly rejected the notion that we lack discretion under Section 208 to consider a complainant's overall purchase of interstate access services from the defendant during a particular monitoring period in assessing the damage or injury to that complainant.[75] We continue to believe, as courts have made clear, that carriers assume the risk of both losses for services they underprice and the prospect of returning amounts realized through rates that are unjustly or unreasonably high.[76] We also maintain our view that a carrier may properly be required to make whole those who have been injured by unlawful rates and practices without regard to whether the carrier has achieved its authorized rate of return overall.[77] Nevertheless, we believe it appropriate for purposes of assessing the complainants' damages claims to examine the complainants' overall purchase of interstate access services from the respective defendants during the period covered by the complaints.

44. Significantly, the complainants do not dispute that, in their purchases of interstate access services from defendants, they benefitted substantially from defendants' rates that produced underearnings in one or more access service categories. Nor do they dispute that defendants, consistent with the Commission's rate of return prescription requirements, could have lawfully effected changes in those rates in order to bring their earnings in line with the prescription, resulting in higher charges to complainants. Thus, while we view it as a reasonable starting point to look at

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[71] *See Seaboard*, 442 U.S. 444, 455, n.8:

> If a shipper proves a rate is unreasonable and that he was damaged in the full amount he was overcharged, the outcome of a § 13(1) [§ 208] proceeding will be no different than that of a § 15(8)(a) [§ 204] proceeding in which the carrier fails to establish the reasonableness of the rate.

[72] *MCI Damages Order* at para 37.

[73] *MCI Damages Order* at para. 33.

[74] *MCI Liability Order*, 5 FCC Rcd at 223.

[75] *MCI Damages Order* at para. 35.

[76] *See MCI Liability Order*, 5 FCC Rcd at 223.

[77] *Id.*

the difference between the amounts complainants paid for defendants' access services on a category basis and the amounts they would have paid if defendants had earned at the prescribed level for the relevant category, we find it also reasonable to offset payments by complainants that contributed to defendants' excessive earnings to the extent that it can be shown that complainants benefitted from defendants' underearnings during the relevant period.

45. In the *MCI Damages Order*, we rejected claims that (1) the Commission has no jurisdiction to allow the defendants to offset damage claims because it would, in effect, be a determination of a carrier's right against a customer;[78] (2) that the "filed rate doctrine" prohibits the allowance of offsets;[79] and (3) that allowing offsets would somehow repeal our rate of return prescription on a category basis.[80] We emphasized that the issue presented by these complaints and contested by the defendants is the extent to which the complainants have been damaged as a consequence of defendants' violations of a binding rate of return prescription and that the focus of the complaints is not defendants' individual interstate access rates *per se*, but the excessive earnings produced by those rates and their effect on complainants.[81] We also rejected the contention that allowing offsets based on a complainant's purchase of access services at rates that produced underearnings results in unlawful cross-subsidization. As we stated in the *MCI Damages Order*, our decision to consider such offsets simply recognizes that although the complainants have legitimate claims for damages as a result of defendants' violations of the rate of return prescription, the complainants enjoyed significant offsetting benefits in the form of lower rates as well.[82] The complainants have provided no new information or arguments that would persuade us to depart from our holdings. Moreover, as we emphasized in the *MCI Damages Order*, we view offsets in the complaint context as appropriate only in relation to a particular complainant's purchase of access service from a defendant carrier. A defendant would not, for example, be able to rely on undercharges to a separate customer or underearnings in general to offset a damages claim based on the measures adopted here. In particular, a complainant that takes service in only one access service category that overearned would not have received the benefit of a defendant's underearnings in access categories from which service is not taken.

46. Based upon our decision regarding the computation of damages, we award damages to complainants as specified in Appendix C to this Memorandum Opinion and Order. In reaching the amounts specified in Appendix C, we have reviewed the damages calculations provided by both complainants and defendants and made adjustments to these calculations as explained in Appendix C. In addition, we accept the defendants' claims for offsets to the extent that the record shows that the complainants purchased access services from the defendants during the period in question at rates that produced earnings below the Commission's prescribed levels. We address the complainants' claims for interest on the damages amounts, as well as their claims for attorney's fees, in the sections below.

2. Interest on Damages Awards

a. Contentions of the Parties

47. The defendants argue that complainants are not entitled to prejudgment interest should the Commission award damages in these proceedings.[83] The defendants ground their claim on the contention that the amount of damages has been sharply disputed in these proceedings.[84] The defendants further contend that interest would penalize them even though they have not been accused of deliberate wrongdoing. Moreover, the defendants contend, interest is not necessary to make the complainants whole.[85]

48. The complainants dispute defendants' claims that they are not entitled to prejudgment interest in connection with any ultimate award of damages. The complainants contend that an award of prejudgment interest is appropriate in the instant complaints because it is explicitly provided for in the parallel refund remedy under Section 204(a)(1) of the Act and is typically awarded in overcharge cases under the Act in order to make the injured party whole.

b. Discussion

49. In deciding whether to award interest in a particular common carrier complaint case we are generally guided by federal court practice, where the award of prejudgment interest "... is a matter left to the sound discretion of the trial court."[86] The award of interest in a common carrier complaint case is thus guided by considerations of fairness. Applying this standard, we are persuaded that an award of interest is appropriate in these cases. The complainants were effectively deprived of the use of the excessive amounts they paid the defendants as a result of their unlawful rates while the defendants, on the other hand, enjoyed the beneficial use for a substantial period of time of funds to which complainants rightfully have a claim. We are persuaded that interest is required not only to effect a full and fair remedy for the complainants, who paid rates higher than they would have paid had defendants earned within the prescribed level, but also to avoid any unjust enrichment of defendants stemming from their charging rates that we have determined to be unjust and unreasonable under Section 201(b) of the Act.[87] We conclude that interest should be computed at the IRS rate for tax refunds.[88] In addition, we find that interest should begin to accrue from January 1, 1989, the day after which the 1987-1988 monitoring period ended. At that point, defen-

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[78] *MCI Damages Order* at para. 34.
[79] *Id.* at para. 35.
[80] *Id.* at para. 36.
[81] *Id.* at para. 39.
[82] *Id.* at para. 40.
[83] *See, e.g.,* Reply Brief of the NYNEX Companies, File Nos. E-90-328--329, at 6-7; CBT Brief, File No. 90-446, at 31-33.
[84] *See, e.g.,* Bell Atlantic Brief, File No. E-91-172, at 12; Pacific Bell Brief, File No. E-90-333, at 21.
[85] *See, e.g.,* Pacific Bell Brief, File No. E-90-333, at 20.
[86] *United States v. California Board of Equalization*, 650 F.2d 1127, 1132 (9th Cir. 1981), *aff'd*, 456 U.S. 901 (1982), *reh'g denied*, 456 U.S. 985 (1982).
[87] *See New England Telephone and Telegraph Co. v. FCC*, 826 F.2d 1101, 1113 (D.C. Cir. 1987), *cert. denied*, 109 S. Ct. 1942 (1989) (carriers may reasonably be required "to pay full interest for earnings they had no right to retain in the first place.").
[88] We believe that the rationale adopted by the Commission for applying the IRS rate in pole attachment complaint proceedings

dants were subject to the earnings limitations of a new monitoring period. Accordingly, we award interest calculated at the IRS rate for tax refunds[89] from the defendants from January 1, 1989 until the date of full payment to complainants.

3. Attorney's Fees

50. We note that some complainants requested in their complaints that they be awarded attorney's fees and costs in these proceedings. Consistent with prior Commission decisions, we award no attorney's fees or costs to complainants.[90]

IV. PROCEDURAL MATTERS

51. Cable and Wireless Communications, Inc. (Cable & Wireless) filed motions to accept complainant's late-filed interrogatory responses in File Nos. E-90-428, E-90-429 through E-90-435, E-90-436, E-91-019, E-91-020, and E-91-026. One Call Communications, Inc. (One Call) filed a similar motion in File Nos. E-90-197 and E-90-199. Motions for acceptance of late-filed pleadings were filed by the Ameritech Companies in File Nos. E-91-010 through E-91-013; by the Bell South Companies in File Nos. E-91-146, E-91-147 and E-91-173; by Charter Network Company, L.P. in File Nos. E-90-279 and E-90-280; by ACC Long Distance in File Nos. E-90-280 and E-90-315; by Cable and Wireless in File Nos. E-91-019, E-91-020, and E-91-021; by Diversified Tel-Comm Inc. in File No. E-90-257; by First Phone of New England, Inc. in File No. E-90-313; by LDDS Communications, Inc. in File Nos. E-90-229, E-90-230, and E-90-231; by Litel Telecommunications Corp. in File Nos. E-90-333, E-90-334, and E-90-335; by One Call in File Nos. E-90-193, E-90-194, and E-90-198; by South Tel, Inc. in File No. E-90-390; by Teledial America, Inc. in File No. E-90-266; and by TFN Corp. in File No. E-90-209. MCI Telecommunications Corporation, *et al.*, filed a motion for leave to file out of time in File Nos. E-90-423, E-90-442, and E-90-443. American Network Exchange, Inc., *et al.*, (AMNEX) filed a similar motion in File Nos. E-91-140 and E-91-141. MCI Telecommunications Corporation, *et al.*, also filed a motion to refile its reply brief in File No. E-90-423, E-90-442 and E-90-443. In the interest of assuring a full record in this matter, we grant the parties' motions to accept late-filed interrogatory responses and other pleadings.

52. Communications Services Inc., *et al.*, (CSI) filed a motion to supplement record in File No. E-91-159. AMNEX filed similar motions in File Nos. E-91-135, E-91-136 through E-91-139, E-91-142, E-91-143, E-91-144, and E-91-146 and E-91-147. In its Opposition to AMNEX's Motion, The BellSouth Companies included an Alternative Motion requesting that, if the Commission were to grant complainant's Motion, it allow Bell South "to develop and file factual rebuttals to the affidavits attached to the Motion...for a period of sixty (60) days within which to address discovery to affiants and an additional 30 days from the conclusion of discovery to submit a supplemental reply brief in these proceedings."[91] Similarly, the Ameritech Companies filed an Alternative Request to Propound Additional Interrogatories in its opposition to AMNEX's motion to supplement the record. Providence TMC, Ltd. filed a motion for leave to file supplemental damages calculation in File No. E-91-118. Cincinnati Bell Telephone Company (CBT) also filed a motion to file erratum in File Nos. E-90-125, E-90-446, and E-91-026 and motions to accept supplemental legal authority supporting its motion to dismiss in File Nos. E-90-125, E-90-233, E-90-268, and E-90-337. We will grant the motions filed by CSI, AMNEX, and Providence TMC, Ltd. to supplement the record. We also grant CBT's motion to file errata and its motion to accept supplemental legal authority. We will deny the alternative motions filed by the BellSouth Companies and the Ameritech Companies. These defendants have not shown that any benefits that would be derived from additional discovery at this late stage of these proceedings outweigh the substantial burdens and delays such discovery would impose on the parties and the Commission.

53. Williams Telecommunications Group, Inc. (WTG) filed motions to compel responses to its interrogatory in File Nos. E-90-446, E-90-447 through E-90-450, E-90-451, and E-90-452. The disputed interrogatory, the only one propounded by WTG against its defendants, requests that defendants calculate their overearnings for each service category. CBT filed motions to compel in File Nos. E-90-125, E-90-197, E-90-268, E-90-423, E-90-446, E-90-451, E-90-452, and E-91-176. The interrogatories seek information relating to what the complainants actually paid for the defendant's access services, the relationship between complainants and their affiliate operating companies, the accounts and time periods under which complainants purchased CBT's services, and the precise amounts and types of services purchased by complainants. With similar discovery objectives in mind, CBT filed a request for authority to file motions to compel in File Nos. E-90-233, E-90-337, E-91-006, E-91-026, and E-91-159. Telecom*USA, Inc. filed a motion to compel answers to interrogatories in E-91-176. The interrogatories sought to elicit from defendant Telecom*USA, Inc.'s share of the total amount billed to all interstate access services users during the 1987-1988 monitoring period and the total federal and state marginal tax rate during this monitoring period applicable to defendant's interstate taxable revenues. Finally, One Call One Call filed a motion to compel responses to interrogatories in File No. E-90-197 seeking defendant's calculation of damages, and the total amount billed to One Call during the monitoring period for overall interstate

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under Section 204 of the Act, 47 U.S.C. § 204, is equally applicable here. In Teleprompter of Fairmont v. C&P of West Virginia, 79 FCC 2d 232 (1980), the Commission stated

> As a matter of fairness, we believe that the rate of interest applied in a pole attachment complaint proceeding should be readily available, easily applied, and periodically revised to reflect changes in borrowing costs. In light of these considerations, we find the interest rate for federal tax refunds and additional tax payments suitable for use in this type of proceeding. This rate appears in a variety of easily obtained official and commercial publications, and is revised on a regular basis. [Footnote omitted.]

89 The applicable IRS rates are set forth in Appendix D.

90 *Turner v. FCC*, 514 F.2d 1354 (D.C. Cir. 1975).

91 *American Network Exchange, Inc., et al. v. BellSouth*, File Nos. E-91-146 and E-91-147, Opposition to Motion to Supplement the Record and Alternative Motion at 4.

access service and for switched traffic sensitive services. Section 1.729(a) of the rules[92] provides that interrogatories may be used to discover any non-privileged matter that is relevant to the proceeding. The information the parties seek is not, we think, relevant to a determination of the damages incurred by complainants as a result of defendants' rate of return violations. Because the parties' interrogatories do not satisfy Section 1.729(a), we deny the parties' motions to compel responses to interrogatories. Because we find that the information sought is irrelevant to the factual issues before us, we need not address the remaining objections to the interrogatories raised by the respective complainants and defendants.

54. The Ameritech Companies filed motions to serve request for production of documents in File Nos. E-90-221 through E-90-223, E-90-439 and E-90-440, E-90-447 through E-90-450, E-90-258 through E-90-260, E-91-010 through E-91-013, E-91-019 and E-91-020, E-91-071 through E-91-073, E-91-122, and E-91-136 through E-91-138. The NYNEX Companies filed similar motions in E-90-199, E-90-208, E-90-224 and E-90-225, E-90-262 and E-90-263, E-90-311 and E-90-312, E-90-328 and E-90-329, E-90-428 and E-90-436, E-90-442 and E-90-443, E-91-012, E-91-082 and E-91-083, E-91-118, E-91-142 and E-91-143, E-91-175, and E-91-178. The Ameritech Companies also filed motions to have complainants amend their complaints, to request the appointment of Administrative Law Judges and to hold all complaints in abeyance in File Nos. E-90-221 through E-90-223, E-90-447 through E-90-450, E-90-258 through E-90-260, E-90-439, E-90-440, E-91-010 through E-91-013, E-91-019, and E-91-020. These motions are now moot in light of our findings and conclusions set forth in this Memorandum Opinion and Order and are dismissed accordingly.

55. LDDS Communications, Inc. filed a motion requesting an order compelling amendment of the complaint of abeyance in File No. E-90-232. Litel Telecommunications, Corp. filed a similar motion in File No. E-90-266. These motions are moot in light of our findings and conclusions set forth in this Memorandum Opinion and Order and are dismissed accordingly.

V. CONCLUSION

56. We have carefully reviewed the extensive record before us and have found, to the extent indicated here, that complainants are entitled to an award of damages, plus accumulated interest on such damages, for the defendants' violations of the Commission's rate of return prescription for the 1987-1988 monitoring period.

VI. ORDERING CLAUSES

57. Accordingly, IT IS ORDERED, pursuant to Section 4(i), 4(j), 201, 206, 207, 208 and 209 of the Communications Act, as amended, 47 U.S.C. §§ 4(i), 4(j), 201, 206, 207, 208 and 209, that the complaints identified in Appendix A to this Memorandum Opinion and Order ARE GRANTED to the extent indicated above and otherwise ARE DENIED.

58. IT IS FURTHER ORDERED that the defendants identified in Appendix C to this Memorandum Opinion and Order SHALL PAY to the complainants identified in Appendix C the amount specified therein within 60 days after the release date of this Memorandum Opinion and Order.

59. IT IS FURTHER ORDERED that the defendants identified in Appendix C SHALL PAY to the complainants identified in Appendix C interest on the damages specified therein computed at the IRS rates set forth in Appendix D from January 1, 1989 until the date full payment is made.

60. IT IS FURTHER ORDERED that the requests for partial dismissal by American Network Exchange, Inc. of its complaints against United Telephone Company of New Jersey in File No. E-91-152 and against United Telephone Company of Pennsylvania in File No. E-91-155 and the Motion to Dismiss filed by USWC on October 19, 1992 ARE GRANTED.

61. IT IS FURTHER ORDERED that the procedural motions described in paragraphs 50 through 52 above ARE GRANTED to the extent indicated there and otherwise ARE DENIED.

62. IT IS FURTHER ORDERED that the procedural motions described in paragraphs 53 and 54 above and the Applications for Review referenced in n.15 above ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

ACC LONG DISTANCE CORPORATION filed the following complaints:

NEW YORK TELEPHONE COMPANY (NYT),[1]	File No. E-90-315
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY (NET),[1]	File No. E-90-316

AMERICALL SYSTEMS OF LOUISVILLE filed the following complaints:

CINCINNATI BELL TELEPHONE COMPANY (CBT),	File No. E-91-006
SOUTH CENTRAL BELL TELEPHONE COMPANY,[2]	File No. E-91-007
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,[2]	File No. E-91-008
INDIANA BELL TELEPHONE COMPANY,	File No. E-91-010
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-91-011
NEW YORK TELEPHONE COMPANY,	File No. E-91-012
OHIO BELL TELEPHONE COMPANY,	File No. E-91-013

[92] 47 C.F.R. § 1.729(a).

AMERICAN NETWORK EXCHANGE, INC., *et al.*, filed the following complaints:

THE BELL ATLANTIC TELEPHONE COMPANIES (Bell Atlantic),	File No. E-91-135
INDIANA BELL TELEPHONE COMPANY (Indiana Bell),[3]	File No. E-91-136
MICHIGAN BELL TELEPHONE COMPANY (Michigan Bell),[3]	File No. E-91-137
OHIO BELL TELEPHONE COMPANY (Ohio Bell),[3]	File No. E-91-138
WISCONSIN BELL, INC. (Wisconsin Bell),[3]	File No. E-91-139
MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,[4]	File No. E-91-140
NORTHWESTERN BELL TELEPHONE COMPANY,[4]	File No. E-91-141
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-91-142
NEW YORK TELEPHONE COMPANY,	File No. E-91-143
PACIFIC BELL TELEPHONE COMPANY (Pacific Bell),	File No. E-91-144
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-91-146
SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-91-147
SOUTHWESTERN BELL TELEPHONE COMPANY (SW Bell),	File No. E-91-148
UNITED TELEPHONE COMPANY OF THE CAROLINAS,	File No. E-91-149
UNITED TELEPHONE COMPANY OF INDIANA, INC.,	File No. E-91-150
UNITED INTER-MOUNTAIN TELEPHONE COMPANY,	File No. E-91-151
UNITED TELEPHONE COMPANY OF NEW JERSEY, INC.,	File No. E-91-152
UNITED TELEPHONE COMPANY OF THE NORTHWEST,	File No. E-91-153
UNITED TELEPHONE COMPANY OF OHIO,	File No. E-91-154
UNITED TELEPHONE COMPANY OF PENNSYLVANIA,	File No. E-91-155
UNITED TELEPHONE COMPANY OF KANSAS, INC.,	File No. E-91-156

ATC LONG DISTANCE filed the following complaints:

PACIFIC BELL TELEPHONE COMPANY,	File No. E-91-066
INDIANA BELL TELEPHONE COMPANY, INC.,	File No. E-91-071
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-91-072
OHIO BELL TELEPHONE COMPANY,	File No. E-91-073
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-91-074
BELL TELEPHONE COMPANY OF PENNSYLVANIA,[5]	File No. E-91-075
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,[5]	File No. E-91-076
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,[5]	File No. E-91-077
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,[5]	File No. E-91-078
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,[5]	File No. E-91-079
DIAMOND STATE TELEPHONE COMPANY,[5]	File No. E-91-080
NEW JERSEY BELL TELEPHONE COMPANY,[5]	File No. E-91-081
NEW YORK TELEPHONE COMPANY,	File No. E-91-082
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-91-083

AUTOMATED COMMUNICATIONS, INC. filed the following complaints:

CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,	File No. E-91-172
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-91-173
PACIFIC BELL TELEPHONE COMPANY,	File No. E-91-174

CABLE & WIRELESS COMMUNICATIONS, INC. filed the following complaints:

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-428
BELL TELEPHONE COMPANY OF PENNSYLVANIA,	File No. E-90-429
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,	File No. E-90-430
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	File No. E-90-431
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	File No. E-90-432
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	File No. E-90-433
DIAMOND STATE TELEPHONE COMPANY,	File No. E-90-434
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-90-435
NEW YORK TELEPHONE COMPANY,	File No. E-90-436
INDIANA BELL TELEPHONE COMPANY,	File No. E-90-439
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-90-440
OHIO BELL TELEPHONE COMPANY,	File No. E-91-019
WISCONSIN BELL, INC.	File No. E-91-020
PACIFIC BELL TELEPHONE COMPANY,	File No. E-91-021
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-91-023
SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-91-024
CINCINNATI BELL TELEPHONE COMPANY,	File No. E-91-026

CHARTER NETWORK COMPANY, L.P. filed the following complaints:

NEW YORK TELEPHONE COMPANY,	File No. E-90-274
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-275
SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-90-279
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-280

COMMUNICATIONS SERVICES, INC., *et al.*, filed the following complaint:

CINCINNATI BELL TELEPHONE COMPANY,	File No. E-91-159

DIVERSIFIED TEL-COMM INC. filed the following complaint:

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-257

FIRST PHONE OF NEW ENGLAND, INC. filed the following complaints:

NEW YORK TELEPHONE COMPANY,	File No. E-90-311
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-312
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-313

LDDS COMMUNICATIONS, INC. filed the following complaints:

BELL TELEPHONE COMPANY OF PENNSYLVANIA,	File No. E-90-214
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,	File No. E-90-215
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	File No. E-90-216
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	File No. E-90-217
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	File No. E-90-218
DIAMOND STATE TELEPHONE COMPANY,	File No. E-90-219
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-90-220
INDIANA BELL TELEPHONE COMPANY,	File No. E-90-221
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-90-222
OHIO BELL TELEPHONE COMPANY,	File No. E-90-223
NEW YORK TELEPHONE COMPANY,	File No. E-90-224
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-225
PACFIC BELL TELEPHONE COMPANY,	File No. E-90-229
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-230
SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-90-231
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-232
CINCINNATI BELL TELEPHONE COMPANY,	File No. E-90-233
CONTEL OF INDIANA, INC.,	File No. E-90-238
GTE NORTH, INC.,	File No. E-90-246
GTE SOUTHWEST, INC.,	File No. E-90-247

LITEL TELECOMMUNICATIONS CORP. filed the following complaints:

BELL TELEPHONE COMPANY OF PENNSYLVANIA,	File No. E-90-317
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,	File No. E-90-318
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	File No. E-90-319
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	File No. E-90-320
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	File No. E-90-321
DIAMOND STATE TELEPHONE COMPANY,	File No. E-90-322
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-90-323
NEW YORK TELEFHONE COMPANY,	File No. E-90-328
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-329
MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-330
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-331
PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	File No. E-90-332
PACIFIC BELL TELEPHONE COMPANY,	File No. E-90-333
SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-90-334
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-335
CINCINNATI BELL TELEPHONE COMPANY,	File No. E-90-337

LONG DISTANCE SAVERS, INC. filed the following complaint:

SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-91-117

MCI TELECOMMUNICATIONS CORPORATION, *et al.*, filed the following complaints:

CINCINNATI BELL TELEPHONE COMPANY,	File No. E-90-423
NEW YORK TELEPHONE COMPANY,	File No. E-90-442
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-443

ONE CALL COMMUNICATIONS, INC. filed the following complaints:

SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-90-193
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-194
CINCINNATI BELL TELEPHONE COMPANY,	File No. E-90-197
PACIFIC BELL TELEPHONE COMPANY,	File No. E-90-198
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-199

PROVIDENCE TMC, LTD. filed the following complaint:

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-91-118

SOUTH TEL, INC. filed the following complaint:

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-390

TELAMARKETING INVESTMENTS, LTD. filed the following complaint:

OHIO BELL TELEPHONE COMPANY,	File No. E-91-122

TELECOM*USA, INC. filed the following complaints:

NEW YORK TELEPHONE COMPANY,	File No. E-91-175
CINCINNATI BELL TELEPHONE COMPANY,	File No. E-91-176
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-91-178

TELEDIAL AMERICA, INC. filed the following complaints:

INDIANA BELL TELEPHONE COMPANY,	File No. E-90-258
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-90-259
OHIO BELL TELEPHONE COMPANY,	File No. E-90-260
NEW YORK TELEPHONE COMPANY,	File No. E-90-262
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-263
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-264
SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-90-265
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-266
CINCINNATI BELL TELEPHONE COMPANY,	File No. E-90-268

TFN CORP. filed the following complaints:

CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,	File No. E-90-203
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	File No. E-90-204
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	File No. E-90-205
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	File No. E-90-206
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-90-207
NEW YORK TELEPHONE COMPANY,	File No. E-90-208
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-209

US SPRINT COMMUNICATIONS COMPANY, L.P. filed the following complaints:

NEW YORK TELEPHONE COMPANY,	File No. E-90-122
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-123
CINCINNATI BELL TELEPHONE COMPANY,	File No. E-90-125

WESTINGHOUSE COMMUNICATIONS, a division of WESTINGHOUSE ELECTRIC CORPORATION filed the following complaints:

THE BELL ATLANTIC TELEPHONE COMPANIES,	File No. E-91-125
NEW YORK TELEPHONE COMPANY,	File No. E-91-126
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-91-127
PACIFIC BELL TELEPHONE COMPANY,	File No. E-91-129
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-91-130

WILLIAMS TELECOMMUNICATIONS GROUP, INC. filed the following complaints:

BELL ATLANTIC,	File No. E-90-444
BELLSOUTH TELEPHONE COMPANIES,	File No. E-90-445
CINCINNATI BELL TELEPHONE COMPANY,	File No. E-90-446
INDIANA BELL TELEPHONE COMPANY,	File No. E-90-447
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-90-448
OHIO BELL TELEPHONE COMPANY,	File No. E-90-449
WISCONSIN BELL, INC.	File No. E-90-450
MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-451
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-452
PACIFIC BELL,	File No. E-90-454

FOOTNOTES

[1] These companies collectively referred to as the NYNEX Companies.

[2] These companies collectively referred to as the BellSouth Companies.

[3] These companies collectively referred to as the Ameritech Companies.

[4] These companies collectively referred to as USWC.

[5] These companies collectively referred to as the Bell Atlantic Companies.

APPENDIX B

Rates of Return

Defendant	Common Line	Special Access	Switched Traffic Sensitive
The Ameritech Companies:			
Indiana Bell Telephone Company	12.01%	8.36%	14.81%
Michigan Bell Telephone Company	12.59	6.03	15.09
Ohio Bell Telephone Company	12.08	13.27	12.73
Wisconsin Bell, Inc.	12.11	14.00	11.59
Bell Atlantic Companies	11.81	11.81	13.26
BellSouth:	12.01	10.45	15.21
Southern Bell Telephone and Telegraph Co.:			
Florida	11.94	8.92	16.30
Georgia	12.01	9.34	14.44
North Carolina	11.99	12.75	17.94
South Carolina	12.03	11.71	15.82
South Central Bell Telephone Company:			
Alabama	12.08	10.13	14.67
Kentucky	12.20	10.69	13.30
Louisiana	12.18	9.29	14.98
Mississippi	11.63	13.99	13.26
Tennessee	12.21	12.68	14.98
Cincinnati Bell Telephone Company	12.61	12.78	16.46
Contel of Pennsylvania, Inc.	12.09	14.38	14.24
Contel of Virginia, Inc.	12.09	15.66	16.21
GTE North Incorporated-Illinois	12.08	12.76	10.88
GTE North Incorporated-Indiana	12.08	12.16	11.04
GTE North Incorporated-Iowa	12.10	11.18	10.32
GTE North Incorporated-Michigan	12.10	13.05	11.84
GTE North Incorporated-Minnesota	12.10	(12.57)	14.37
GTE North Incorporated-Missouri	12.09	14.29	20.44
GTE North Incorporated-Nebraska	12.07	(3.64)	18.88
GTE North Incorporated-Ohio	12.08	15.28	11.87
GTE North Incorporated-Pennsylvania	12.09	13.54	9.72
GTE North Incorporated-Wisconsin	12.09	22.24	17.13
GTE Northwest Incorporated-ID/MT	12.08	4.54	16.07
GTE Northwest Incorporated-WA/OR/CA	12.09	4.65	15.36
GTE Southwest Incorporated	12.09	10.50	13.40
The NYNEX Companies:			
New England Telephone and Telegraph Co.	12.06	9.75	13.24
New York Telephone Company	11.82	10.32	12.72

Defendant	Common Line	Special Access	Switched Traffic Sensitive
Pacific Bell Telephone Company	12.10	13.37	14.83
Southwestern Bell Telephone Company	12.09	12.76	12.43/16.27
United Telephone Company of the Carolinas	12.09	18.67	16.49
United Telephone Company of Indiana, Inc.	12.08	9.87	16.64
United Inter-Mountain Telephone Company-TN	12.09	13.90	15.48
United Inter-Mountain Telephone Company-VA	12.09	10.11	16.62
United Telephone Company of New Jersey	12.09	11.83	14.60
United Telephone Company of the Northwest	12.09	8.93	18.79
United Telephone Company of Ohio	12.07	11.62	15.62
United Telephone Company of Pennsylvania	12.09	16.24	16.32
United Telephone Company of Kansas, Inc.	12.09	10.98	18.20
United Telephone Company of Missouri	12.09	10.98	18.20
USWC			12.89
Mountain States Telephone and Telegraph Company	12.26	14.22	[1]
Northwestern Bell Telephone Company	12.03	14.71	[1]
Pacific Northwest Bell Telephone Company	12.30	9.41	[1]

[1] USWC did not report rates of return for each of its operating companies in the Switched Traffic Sensitive category.

APPENDIX C

AMERITECH

[amounts in dollars]

Indiana Bell Telephone Company, Inc.

Complainant	DAMAGES [1]	OFFSETS [2]	NET
Americall Systems of Louisville File No. E-91-010	3,915	(906)	3,009
American Network Exchange, Inc., et al. File No. E-91-136			
American Network Exchange, Inc.	-0- [3]	-0-	-0-
Communications Services, Inc.	29,845 [4]	-0-	29,845
Communigroup of K.C., Inc.	-0-	-0-	-0-
Long Distance Service, Inc.	391	(50) [2]	341
National Tele-Services, Inc.	-0-	-0-	-0-
RCI Network Services, Inc.	1,288	(50) [2]	1,238
Schneider Communications, Inc.	622	(378) [2]	244
TelaMarketing Corp. of Louisiana	-0-	-0-	-0-
Telephone Associates Long Distance Services, Inc.	-0-	-0-	-0-
Total-Tel USA	423 [4]	(17) [2]	406

Complainant	DAMAGES [1]	OFFSETS [2]	NET
ATC Long Distance, et al.[7] File No. E-91-071			
Americall	13	-0-	13
Advanced Network Systems	528	-0-	528
Long Distance America	182	(33)	149
Telus	4,175	(91)	4,084
Cable & Wireless Communications, Inc. File No. E-90-439	8,410	(3,804)	4,606
LDDS Communications, Inc. File No. E-91-221	-0- [8]	-0-	-0-
Teledial America, Inc. File No. E-90-258	4,289	(1,400)	2,889 [9]
Williams Telecommunications Group, Inc. File No. E-90-447	42,347 [10]	-0-	42,347

Michigan Bell Telephone Company

Complainant	DAMAGES [1]	OFFSETS [2]	NET
Americall Systems of Louisville File No. E-91-011	21	(102)	-0-
American Network Exchange, Inc., et al. File No. E-91-137			
American Network Exchange, Inc.	-0- [3]	-0-	-0-
Communications Services, Inc.	70,004 [4]	-0-	70,004

Complainant	DAMAGES [1]	OFFSETS [2]	NET
Communigroup of K.C., Inc.	-0-	-0-	-0-
Long Distance Service, Inc.	828 [5]	(205) [2]	623
National Tele-Services, Inc.	-0-	-0-	-0-
RCI Network Services, Inc.	5,943 [5]	(22,978) [2]	-0-
Schneider Communications, Inc.	1,156 [5]	(1,817) [2]	-0-
TelaMarketing Corp. of Louisiana	411 [4]	-0-	411
Telephone Associates Long Distance Services, Inc.	-0-	-0-	-0-
Total-Tel USA	1,527 [4]	(282) [2]	1,245
ATC Long Distance, et al. [7] File No. E-91-072			
Long Distance America	482	(77)	405
Telus	2,530	(26)	2,504
Southtel	1,740	(153)	1,587
Cable & Wireless Communications, Inc. File No. E-90-440	21,157 [1b]	(19,129)	2,028
LDDS Communications, Inc. File No. E-91-222	-0- [8]	-0-	-0-
Teledial America, Inc. File No. E-90-259	102,734	(545,603)	-0- [9]
Williams Telecommunications Group, Inc. File No. E-90-448	49,090 [10]	-0-	49,090

The Ohio Bell Telephone Company

Complainant	DAMAGES [1]	OFFSETS [2]	NET
Americall Systems of Louisville File No. E-91-013	73	-0-	73
American Network Exchange, Inc., et al. File No. E-91-138			
American Network Exchange, Inc.	-0- [3]	-0-	-0-
Communications Services, Inc.	44,273 [4]	-0-	44,273
Communigroup of K.C., Inc.	-0-	-0-	-0-
Long Distance Service, Inc.	96 [6]	-0-	96
National Tele-Services, Inc.	-0-	-0-	-0-
RCI Network Services, Inc.	7,295 [6]	-0-	7,295
Schneider Communications, Inc.	-0-	-0-	-0-
TelaMarketing Corp. of Louisiana	41 [4]	-0-	41
Telephone Associates Long Distance Services, Inc.	-0-	-0-	-0-
Total-Tel USA	192 [4]	-0-	192
ATC Long Distance, et al.[7] File No. E-91-073			
Americall	4	-0-	4
Long Distance America	51	-0-	51

Complainant	DAMAGES [1]	OFFSETS [2]	NET
Telus	1,380	-0-	1,380
Southtel	100	-0-	100
Cable & Wireless Communications, Inc. File No. E-91-019	6,876	-0-	6,876
LDDS Communications, Inc. File No. E-91-223	-0- [8]	-0-	-0-
Teledial America, Inc. File No. E-90-260	443	(61)	382 [9]
Williams Telecommunications Group, Inc. File No. E-90-449	7,195 [10]	-0-	7,195

Wisconsin Bell, Inc.

Complainant	DAMAGES [1]	OFFSETS [2]	NET
American Network Exchange, Inc., et al. File No. E-91-139			
American Network Exchange, Inc.	-0- [3]	-0-	-0-
Communications Services, Inc.	726 [4]	-0-	726
Communigroup of K.C., Inc.	-0-	-0-	-0-
Long Distance Service, Inc.	-0-	-0-	-0-
National Tele-Services, Inc.	-0-	-0-	-0-

Complainant	DAMAGES [1]	OFFSETS [2]	NET
RCI Network Services, Inc.	-0-	-0-	-0-
Schneider Communications, Inc.	147,050	(25,905)	121,145
TelaMarketing Corp. of Louisiana	-0-	-0-	-0-
Telephone Associates Long Distance Services, Inc.	428	(734)	-0-
Total-Tel USA	-0-	-0-	-0-
Cable & Wireless Communications, Inc. File No. E-91-020	2,174 [1a]	(1,905)	269
Williams Telecommunications Group, Inc. File No. E-90-450	2,016 [10]	(1,890)	126

NOTES FOR AMERITECH

1. Unless otherwise noted, complainants erroneously used the overall target rate of return plus buffer of 12.25 percent in computing damages for category overearnings. We note that the target plus buffer rate for category overearnings is 12.40 percent. The overall target plus buffer rate of 12.25 percent is inapplicable to category earnings and the complainant's damages have been recalculated using the correct rate of 12.40 percent. Furthermore, complainants do not calculate offsets for categories in which the defendant LEC earned below the target rate of return prescription. Therefore, in these cases, we accept defendants' calculations of appropriate damages for any category overearnings and offsets for any category underearnings (subject to note 2, below).

In instances where complainants calculated damages correctly, the awards are identified with the notation "1a".

In instances where there is a variance in the amount of service purchased/billed to a complainant and the defendant does not dispute the complainant's purchase(s) amount(s) or offer persuasive evidence supporting a contrary finding, we will accept complainant's access service purchases amounts. We add, however, that damages have been recalculated to rectify complainants' error described above. These cases are identified by the notation "1b".

2. Defendants' calculations of offsets for underearnings in the interstate access service categories have been recalculated because defendants erroneously used 12.40 percent as the basis to determine the amount of the category underearning and the resulting offset for the particular complainant. Thus, we have recalculated defendants' computations using 12 percent as the basis to calculate a category underearning and any resulting offset.

3. Complainant claims it does not have purchase data or records on this company to ascertain damages and states that it is waiting for billing and purchasing information from the defendants. The parties were given ample opportunity to develop a comprehensive record upon which damages could be determined and submitted to the Commission. American Network Exchange, Inc. has failed to provide the Commission with evidence to support an award of damages.

4. American Network Exchange, Inc., *et al.*, (AMNEX) filed a motion to supplement the record with an affidavit by an officer of this complainant company. In the affidavit, the officer attests to the accuracy of the amount of purchases listed in AMNEX's briefs based on the complainant company's records. Defendants oppose the motion on the grounds that the offered affidavit is not probative of any issue in these proceedings. We will grant AMNEX's motion to supplement the record and will accept the proffered affidavits. Defendants have not persuaded us that the affidavits are not probative.

For complainant companies which have offered affidavits verifying the purchase data in the briefs, we accept complainants' calculations of damages. Where defendant provides calculations of category offsets based on underearnings, we accept the computations subject to note 2 above. In those instances where there is no accompanying affidavit, we accept defendants' calculations of damages and appropriate offsets (subject to note 2 above).

5. In File No. E-91-137, the damage award, calculated by the defendant subject to note 2 above, only encompasses amounts for overearnings in the traffic sensitive category despite an overearning in the carrier common line category because complainant failed to claim damages resulting from an overearning in the carrier common line category.

6. Damage awards for File No. E-91-138 include amounts for overearnings in the traffic sensitive and special access categories (calculated by defendant subject to note 2 above) because complainant claims damages due to category overearnings in its briefs.

7. Defendants Indiana Bell Telephone Company, Inc., Michigan Bell Telephone Company, and The Ohio Bell Telephone Company object that ATC Long Distance includes damage claims in their initial brief for an additional 18 companies not named in the formal complaint. Reply Brief of Indiana Bell Telephone Co., *et al.* at 8 (File Nos. E-91-071--073). We have held that a complainant may claim damages for overearnings in interstate access services on behalf of wholly-owned subsidiaries, if those subsidiaries were wholly-owned during the monitoring period in question. *See MCI Damages Order* at para. 10. In the instant case, it is not clear that the additional companies were wholly-owned subsidiaries of the named complainant during the 1987-1988 monitoring period. Complainant merely states that these entities are either predecessors, subsidiaries or affiliates. *See, e.g.,* Brief of ATC Long Distance at 30, n.70 (File Nos. E-91-071--073); Formal Complaint of ATC Long Distance at 2, para. 1 (File No. E-91-071). In the absence of evidence demonstrating that these subsequently added entities were wholly-owned subsidiaries of the named complainant, we reject complainant's claims and deny damages arising from access services provided to these companies.

8. Defendants Indiana Bell Telephone Company, Inc., Michigan Bell Telephone Company, and The Ohio Bell Telephone Company object that LDDS Communications, Inc. includes damage claims in their initial brief for approximately 125 companies not named in the formal complaint. Reply Brief of Indiana Bell Telephone Co., *et al.* at 8 (File Nos. E-90-221--223). We have held that a complainant may claim damages for overearnings in interstate access services on behalf of wholly-owned subsidiaries, if those subsidiaries were wholly-owned during the monitoring period in question. *See MCI Damages Order* at para. 10. In the instant case, it is not clear that the additional companies were wholly-owned subsidiaries of the named complainant during the 1987-1988 monitoring period. Complainant merely states that these entities are either predecessors, subsidiaries or affiliates. *See, e.g.,* Brief of LDDS Communications, Inc. at 30 (File Nos. E-90-221--223); Formal Complaint of LDDS Communications, Inc. at 2, para. 1 (File No. E-90-221). In the absence of evidence showing that these subsequently added entities were wholly-owned subsidiaries of the named complainant, we reject complainant's claims and deny damages arising from access services provided to these companies.

Because purchase amounts/billing amounts for access services by complainants are in dispute, the record in this proceeding does not support a calculation of damages with a reasonable degree of certainty and thus, cannot support an award of damages.

9. Without providing the origin of its claim, defendants contend that for 1987, complainant does not separate access purchases by category, rather it provides an aggregate amount. Reply Brief of Indiana Bell Telephone Company, Inc., *et al.* at 8 (File Nos. E-90-258--260). Defendants, however, note that they are "unable to provide a breakout of category purchases *for only the first eleven months of 1987.*"

Id., n.19 (emphasis added). Thus, it is not clear that information about access service purchases on a per category basis is available or credible. However, in response to interrogatories, complainant supplies its records of access category purchases and provides an affidavit of a company officer attesting to the validity and accuracy of the amounts. Therefore, in light of this, we accept complainant's purchases amounts as a basis for recalculating its damages attributable to category overearning described *supra* in note 1.

We also find defendants' billing records an acceptable basis for computing offsets because complainants fail to provide any purchase records in categories in which the defendants earned below the target rate of return prescription. Accordingly, we accept defendants' billing records with regard to purchases in underearning access categories and have recalculated the offsets resulting from the category underearnings in accordance with note 2, *supra*.

10. Complainant does not provide any calculations of damages or offsets. Defendant, on the other hand, provides computations of damages and appropriate offsets without waiving their contentions that they are not liable for any damages and that, in any event, their calculations may not be the proper measure of damages. Complainant states that defendants' calculations of damages are the minimum to which it is entitled. Consolidated Brief of Williams Telecommunications Group, Inc. at 6 n.5 (File Nos. E-90-447--450). Because complainant does not offer a calculation of its damages, we accept defendants' calculations of damages and offsets.

THE BELL ATLANTIC TELEPHONE COMPANIES

[amounts in dollars]

The Bell Atlantic Telephone Companies [1]

Complainant	DAMAGES [2]	OFFSETS [3]	NET
American Network Exchange, Inc., et al. File No. E-91-135			
American Network Exchange, Inc.	1,867 [4]	(368)	1,499
Communications Services, Inc.	-0- [5]	-0-	-0-
Communigroup of K.C., Inc.	341	(157)	184
Dial 'N Save, Inc.	6,724	(2,471)	4,253
Long Distance Service, Inc.	26,778	(6,001)	20,777
Metromedia Long Distance, Inc.	194,804	(140,133)	54,671
National Tele-Services, Inc.	5,441	(796)	4,645
RCI Network Services, Inc.	65,904	(35,903)	29,973
TelaMarketing Corp. of Louisiana	-0- [6]	-0-	-0-
Lehigh Valley, Inc.	6,560	(2,296)	4,264
Westel, Inc.	1,277 [7]	(15)	1,262

Complainant	DAMAGES [2]	OFFSETS [3]	NET
ATC Long Distance, et al. File No. E-91-075	32,133	(15,000)	17,133
Automated Communi- cations, Inc. File No. E-91-172 [8]	505	-0-	505
Cable & Wireless Communications, Inc. File No. E-90-429 through E-90-435	373,000 [9]	(78,800)	294,300
LDDS Communications, Inc. File Nos. E-90-214 through E-90-220	96,240 [10]	(3,000)	93,240
Litel Telecommuni- cations, Inc. File Nos. E-90-317 through E-90-323	101,763 [10]	(26,000)	75,763
TFN Corp. File Nos. E-90-203 through E-90-207 [11]	11,784	(3,300)	8,484
Westinghouse Communi- cations File No. E-91-125	5,100 [12]	(5,400)	-0-
Williams Telecommuni- cations Group, Inc. File No. E-90-445	900 [13]	(14,000)	-0-

NOTES FOR THE BELL ATLANTIC TELEPHONE COMPANIES

1. The Bell Atlantic telephone companies consist of the Bell Telephone Company of Pennsylvania, the Chesapeake and Potomac telephone companies (The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, and The Chesapeake and Potomac Telephone Company of West Virginia), Diamond State Telephone Company, and New Jersey Bell Telephone Company.

2. Unless otherwise noted, complainants erroneously used the overall target rate of return plus buffer of 12.25 percent in computing damages for category overearnings. We note that the target plus buffer rate for category overearnings is 12.40 percent. The overall target plus buffer rate of 12.25 percent is inapplicable to category earnings and the complainant's damages have been recalculated using the correct rate of 12.40 percent.

3. Defendant argues against awarding damages based on overearnings in the access categories. However, it adds that if the Commission is going to award damages based on category overearnings, it should require complainant to offset category overearnings with category underearnings. Defendant also contends that complainant ignores category underearnings altogether in its damages calculations.

We accept Bell Atlantic's calculations of offsets. Complainants provided no offsets calculations and did not object to Bell Atlantic's calculations of amounts it claims should be offset.

4. Damages include amounts on behalf of NYCOM Information Services, Inc. and Diversified Communications Group. *See* Supplemental Response of the Bell Atlantic Telephone Companies (filed Aug. 28, 1992).

5. Bell Atlantic states that it is unable to produce billing records for this complainant company. Reply Brief of Bell Atlantic at 8. Bell Atlantic states that it is unable to find a company by this name in Bellcore's listing of ACNA codes. *Id.* Complainant has not rebutted this contention specifically, rather complainant maintains that the complainant company was billed a sum certain for access services during the monitoring period in question. Without additional information or verification from complainant, we cannot award damages based on this unsubstantiated claim.

6. Bell Atlantic claims that TelaMarketing Corp. did not purchase any interstate access services during the monitoring period in question. Third Supplemental Response of the Bell Atlantic Telephone Companies (filed Oct. 8, 1992), Attachment 3, n.5. Moreover, Bell Atlantic protests that LDDS Communications, the parent company of TelaMarketing Corp. of Louisiana, has attempted to achieve a double recovery by prosecuting more than one complaint against Bell Atlantic. Reply Brief of Bell Atlantic at 7, File No. E-91-135 (filed Sept. 2, 1992). *See also* Reply Brief of the Bell Atlantic Telephone Companies at 2, File Nos. E-90-214--220 (filed Sept. 8, 1992). Based upon an affidavit filed by LDDS Communications on behalf of TelaMarketing, it appears that TelaMarketing Corp. of Louisiana is a subsidiary of LDDS Communications. *See* Motion to Supplement the Record by the American Network Exchange, Inc., *et al.*, (AMNEX) Attachment 2, File No. E-91-135 (filed Oct. 16, 1992). Those complainants will not be permitted to recover multiple damage awards from the same defendant based on overearnings in the 1987-1988 monitoring period. Thus, damages are denied to TelaMarketing Corp. of Louisiana in this proceeding because of the pending complaint of TelaMarketing's parent company in File Nos. E-90-214 through E-90-220.

7. AMNEX filed a motion to supplement the record with an affidavit by an officer of this complainant company. In the affidavit, the officer attests to the accuracy of the amount of purchases listed in AMNEX's briefs based on the complainant company's records. We will grant AMNEX's motion to supplement the record and will accept the offered affidavits.

8. Sole defendant is the Chesapeake and Potomac Telephone Company.

9. Bell Atlantic notes that complainant incorrectly uses the overall rate of return prescription plus buffer, 12.25 percent, to calculate damages on a per access category basis, using 12.40 percent, the target plus buffer for access categories. *See* Reply Brief of Bell Atlantic at 7, File No. E-90-429, *et al.* We have recalculated complainant's damages using 12.40 percent when the complainant seeks damages on a per category basis.

10. Relying on complainant's billed amounts for access service in the traffic sensitive category, we have recalculated complainant's damages computation because of the error described above in note 2. The billing amounts are corroborated by complainant's responses to defendant's interrogatories, and are not challenged or disputed by defendant.

11. Bell Telephone Company of Pennsylvania and Diamond State Telephone Company are not defendants in this proceeding. Thus, the net damage award includes no consideration of their interstate access earnings during the 1987-1988 monitoring period.

12. Bell Atlantic argues that Westinghouse incorrectly calculates its damages by combining revenues from the carrier common line category with its revenues in the traffic sensitive category, resulting in an overstatement of overearnings. Second Supplemental Response of the Bell Atlantic Telephone Companies at 2 (filed Aug. 27, 1992). Moreover, Bell Atlantic contends that Westinghouse erroneously included non-interstate access revenues in its calculation of traffic sensitive revenues. *Id.* After identifying these alleged errors in computation, Bell Atlantic proffers a re-calculation of Westinghouse's damages, including offsets for category underearnings, which we find to be more accurate than the figures proffered by Westinghouse because Bell Atlantic is in a better position to provide and explain its billing records and procedures.

13. *See* Brief of Williams Telecommunications Group, Inc. at 6, n.5.

BELLSOUTH CORPORATION

[amounts in dollars]

Southern Bell Telephone and Telegraph Company

Complainant	DAMAGES [1]	OFFSETS [2]	NET
Americall Systems of Louisville File No. E-91-008	383	-0-	383
American Network Exchange, Inc., et al. File No. E-91-146 [3]			
American Network Exchange, Inc.	-0- [4]	-0-	-0-
Communications Services, Inc.	669,167	-0-	669,167
Long Distance Service, Inc.	3,615	-0-	3,615
Metromedia Long Distance, Inc.	788,992	-0-	788,992
National Tele-Services, Inc.	-0-	-0-	-0-
Schneider Communications, Inc.	-0-	-0-	-0-
TelaMarketing Corp. of Louisiana	30,736	-0-	30,736
Total-Tel USA	11,298	-0-	11,298
Westel, Inc.	1,518	-0-	1,518
ATC Long Distance, et al. File No. E-91-074	3,216,426 [5]	-0-	3,216,426

Complainant	DAMAGES [1]	OFFSETS [2]	NET
Automated Communications, Inc. File No. E-91-173	365	-0-	365
Cable & Wireless Communications, Inc. File No. E-91-023	155,384	-0-	155,384
Charter Network Company File No. E-90-280	7,573	-0-	7,573
Diversified Tel-Comm Inc. (d/b/a Biz-Tel) File No. E-90-257	35,240	-0-	35,240
First Phone of New England, Inc. File No. E-90-313	2,594	-0-	2,594
LDDS Communications, Inc. File No. E-90-230	762,225 [6]	-0-	762,225
Litel Telecommunications, Inc. File No. E-90-335	82,865	-0-	82,865
One Call Communications, Inc. File No. E-90-194	4,424	-0-	4,424
South Tel, Inc. File No. E-90-390	260,511	-0-	260,511
Teledial America, Inc. File No. E-90-264	3,929	-0-	3,929
TFN Corp. File No. E-90-209	64,913	-0-	64,913
Westinghouse Communications File No. E-91-130	4,351 [1a]	-0-	4,351
Williams Telecommunications Group, Inc. File No. E-90-445	-0- [7]	-0-	-0-

South Central Bell Telephone Company

Complainant	DAMAGES [1]	OFFSETS [2]	NET
Americall Systems of Louisville File No. E-91-007	21,110	-0-	21,110
American Network Exchange, Inc., et al. File No. E-91-147 [3]			
American Network Exchange, Inc.	-0- [4]	-0-	-0-
Communications Services, Inc.	134,033	-0-	134,033
Long Distance Service, Inc.	360	-0-	360
Metromedia Long Distance, Inc.	135,569	-0-	135,569
National Tele-Services, Inc.	326	-0-	326
TelaMarketing Corp. of Louisiana	122,980	-0-	122,980
Total-Tel USA	102	-0-	102
Westel, Inc.	2,453	-0-	2,453
Cable & Wireless Communications, Inc. File No. E-91-024	13,096	-0-	13,096
Charter Network Company File No. E-90-279	2,581	-0-	2,581
LDDS Communications, Inc. File No. E-90-231	2,268,015 [6]	-0-	2,268,015

Complainant	DAMAGES [1]	OFFSETS [2]	NET
Litel Telecommunications, Inc. File No. E-90-334	34,893	-0-	34,893
Long Distance Savers, Inc. File No. E-91-117	255,882	-0-	255,882
One Call Communications, Inc. File No. E-90-193	1,009	-0-	1,009
Teledial America, Inc. File No. E-90-265	716	-0-	716

NOTES FOR BELLSOUTH CORPORATION

1. Unless otherwise noted, complainants erroneously used the overall target rate of return plus buffer of 12.25 percent in computing damages for category overearnings. We note that the target plus buffer rate for category overearnings is 12.40 percent. The overall target plus buffer rate of 12.25 percent is inapplicable to category earnings and the complainant's damages have been recalculated using the correct rate of 12.40 percent.

Where complainants have correctly calculated damages due to category overearnings, their unadjusted, uncorrected damage awards are identified "1a".

2. BellSouth Telecommunications, Inc. (BellSouth), the parent company of Southern Bell Telephone and Telegraph Company and South Central Bell Telephone Company, erroneously uses 12.25 percent to calculate any overearning in the access categories. As noted previously, this is incorrect because the target plus buffer for the access service categories for the 1987-1988 monitoring period is 12.40 percent, and any overearning in a particular service category should be calculated using that figure. On the other hand, if the carrier underearned in a particular service category, the offset from such an underearning would be calculated using 12 percent, the rate of return for interstate access services for the 1987-1988 monitoring period.

Furthermore, BellSouth contends that any damage award must be reduced twice. First, BellSouth argues that at a minimum, any potential "refund" should be reduced by 20 percent to reflect the non-premium switched access rates purchased by complainants during the monitoring period. Second, BellSouth argues that since complainants did not suffer any actual damage from BellSouth's pricing, any resulting "refund" should be divided in half so that complainant would receive half of the benefit and BellSouth would retain half. We reject both of these arguments. The fact remains that BellSouth, notwithstanding its pricing policies, earned in excess of the Commission's rate of return prescription for the monitoring period. The Commission will not make a party's case and calculate the appropriate category offsets. Thus, we reject BellSouth's damages computation methodology and do not offset complainant's damages for category overearnings.

3. Defendant BellSouth argues that complainant used the wrong FCC Form 492 to calculate its damages. Reply Brief of BellSouth at 11 (File Nos. E-91-146--147). BellSouth argues that the Form 492 filed in February 1990 is its final Form 492 and that all other complainants against BellSouth have used the February Form 492 to calculate damages. We agree with BellSouth and have recalculated complainants' damages using the February 1990 FCC Form 492.

4. Complainant states that it does not have purchase data or records enabling it to calculate damages and that it has asked defendant to provide the necessary data to it in order to compute damages. Reply Brief of American Network Exchange, Inc., *et al.* at 6, n.9 (File Nos. E-91-146--147).

5. Defendant Southern Bell Telephone & Telegraph Company (SBT) notes that ATC Long Distance includes damage claims for carriers who have currently pending individual formal complaints against the BellSouth telephone companies or SBT. The carriers and their file numbers are: Americall Systems of Louisville (File No. E-91-008), Diversified Tel-Comm Inc. (d/b/a Biz-Tel) (File No. E-90-257), First Phone of New England, Inc. (File No. E-90-313), and South Tel, Inc. (File No. E-90-390). *See* Reply Brief of Southern Bell Tel. & Tel. Co. at 8 (File No. E-91-074); *see also* Reply Brief of Southern Bell Tel. & Tel. Co. at 1 (File No. E-90-390). Accordingly, the damage award of ATC Long Distance has been reduced by the amount of the damage awards granted to the above-named complainants in their individual complaint proceedings.

A second adjustment to ATC Long Distance's damage award has been made because complainant includes claims for damages in states where defendant did not provide service during the monitoring period in question. Defendant states that it only operates in four states: Florida, Georgia, North Carolina, and South Carolina and notes that complainant claims damages for five additional states: Alabama, Kentucky, Louisiana, Mississippi, and Tennessee. Reply Brief of Southern Bell Telephone & Telegraph Co. at 8-9. SBT states that it did not do business in these additional states in 1987-1988, and that complainant could not have been damaged by SBT in those states as a result. *Id.* Thus, we will disallow damage claims made by complainant in states where the defendant did not operate during the 1987-1988 monitoring period.

Defendant Southern Bell Telephone & Telegraph Company objects that ATC Long Distance includes damage claims in their initial brief for approximately 16 companies not named in the formal complaint. Reply Brief of Southern Bell Tel. & Tel. Co. at 8, n.6 (File No. E-91-074). Southern Bell contends that in its complaint, ATC Long Distance listed 21 company names, and in its initial brief, claims damages on behalf of 37 entities. *Id.* We have held that a complainant may claim damages for overearnings in interstate access services on behalf of wholly-owned subsidiaries, if those subsidiaries were wholly-owned during the monitoring period in question. *See MCI Damages Order* at para. 10. In the instant case, it is not clear that the additional companies were wholly-owned subsidiaries of the named complainant during the 1987-1988 monitoring period. Complainant merely states that these entities are either predecessors, subsidiaries or affiliates. *See, e.g.,* Brief of ATC Long Distance at 29 (File No. E-91-074); Formal Complaint of ATC Long Distance at 2, para. 1 (File No. E-91-074). In the absence of persuasive evidence or information that these subsequently added entities were wholly-owned subsidiaries of the named complainant, we reject complainant's claims for damages for these subsequently added entities. To the extent that the recalculated damages award includes restitution for overearnings attributable to an improperly included company, the damage award must be adjusted to reflect these disallowed damage claims.

6. BellSouth argues that complainant's calculations of damages must be rejected because complainant includes claims for companies not named in the original complaint. Reply Brief of BellSouth at 8-9, File Nos. E-90-230--231. BellSouth states that complainant listed 30 company names in its complaint and in its initial brief, lists over 100 company names. BellSouth argues that these additional companies are not parties to this proceeding. We have held that a complainant may claim damages for overearnings in interstate access services on behalf of wholly-owned subsidiaries, if those subsidiaries were wholly-owned during the monitoring period in question. *See MCI Damages Order* at para. 10. In the instant case, it is not clear that the additional companies were wholly-owned subsidiaries of the named complainant during the 1987-1988 monitoring period. Complainant merely states that these entities are ei-

ther predecessors, subsidiaries or affiliates. *See, e.g.,* Brief of LDDS Communications, Inc. at 30 n.71 (File Nos. E-90-230--231); Formal Complaint of LDDS Communications, Inc. at 2, para. 1 (File No. E-90-230). In the absence of persuasive evidence or information that these subsequently added entities were wholly-owned subsidiaries of the named complainant, we reject complainant's claims for damages for these subsequently added entities. To the extent that the recalculated damages award includes restitution for overearnings attributable to an improperly included company, the damage award must be adjusted to reflect these disallowed damage claims.

7. Complainant Williams Telecommunications Group, Inc. (WTG) has failed to sustain its burden of proving damages. The parties were given ample opportunity to develop a comprehensive record upon which damages could be determined and submitted to the Commission. WTG has failed to provide the Commission with evidence to support an award of damages. We do find, however, that Southern Bell Telephone and Telegraph Company is liable for exceeding the Commission's rate of return prescription for the 1987-1988 monitoring period.

CINCINNATI BELL TELEPHONE COMPANY

[amounts in dollars]

Complainant	DAMAGES [1]	OFFSETS [2]	NET
Americall Systems of Louisville File No. E-91-006	4,547 [3, 5]	-0-	4,547
Cable & Wireless Communications, Inc. File No. E-91-026	5,362 [3]	-0-	5,362
Communications Services, Inc., et al. File No. E-91-159			
Communications Services, Inc.	20,370 [6]	-0-	20,370
Metromedia Long Distance, Inc.	5,981 [6]	-0-	5,981
TelaMarketing Corp. of Louisiana	299 [6]	-0-	299
Total-Tel USA	339 [6]	-0-	339
LDDS Communications, Inc. File No. E-90-233	8,013 [3, 4, 5]	-0-	8,013
Litel Telecommunications, Inc. File No. E-90-337	40,541 [7]	-0-	40,541
MCI Telecommunications Corporation, et al. File No. E-90-423	836,253 [5, 8]	-0-	836,253

Complainant	DAMAGES [1]	OFFSETS [2]	NET
One Call Communications, Inc. File No. E-90-197	3,044 [5]	-0-	3,044
Telecom*USA, Inc. File No. E-91-176	23,194 [5, 8]	-0-	23,194
Teledial America, Inc. File No. E-90-268	196 [7]	-0-	196
US Sprint Communications Company L.P. File No. E-90-125	577,100 [9]	-0-	577,100
Williams Telecommunications Group, Inc. File No. E-90-446	9,804 [10]	-0-	9,804

NOTES FOR CINCINNATI BELL TELEPHONE COMPANY

1. Unless otherwise noted, complainants erroneously used the overall target rate of return plus buffer of 12.25 percent in computing damages for category overearnings. We note that the target plus buffer rate for category overearnings is 12.40 percent. The overall target plus buffer rate of 12.25 percent is inapplicable to category earnings and the complainant's damages have been recalculated using the correct rate of 12.40 percent.

2. Cincinnati Bell argues that should damages for overearnings be awarded, they should first be offset by underearnings from other monitoring periods. We have rejected this contention previously and are not persuaded that we should reconsider our previous determination that offsets will be allowed, but only from the monitoring period in question.

3. Cincinnati Bell Telephone Company notes that complainant erroneously used the overall rate of return prescription plus buffer of 12.25 percent to calculate damages for category overearnings. In accordance with note 1, we have recalculated complainant's damages using 12.40 percent, the target rate of return for the access categories, when the complainant seeks damages on a per category basis.

4. Defendant Cincinnati Bell objects to complainant's inclusion of claims for damages on behalf of several additional "affiliates" not named in the formal complaint. *See* Response to Complainant's First Set of Interrogatories of Cincinnati Bell Tel. Co. at 2, n.3 (File No. E-90-233); Defendant's Motion to Compel at 2, n.3. Cincinnati Bell filed a motion to compel in order to determine the relationship between the complainant and its affiliates and subsidiaries during the relevant time period, under what accounts, amounts, and time periods that complainant took service from Cincinnati Bell. Defendant's Motion to Compel at 2. In its motion to compel, Cincinnati Bell argues that complainant's responses to interrogatories regarding the question of identity of the complainant and its subsidiaries and affiliates are of little use to it. *Id.* at 2, n.3. We have held that a complainant may claim damages for overearnings in interstate access services on behalf of wholly-owned subsidiaries, if those subsidiaries were wholly-owned during the monitoring period in question. *See MCI Damages Order* at para. 10. In the instant case, it is not clear that the additional companies were wholly-owned subsidiaries of the named complainant during the 1987-1988 monitoring period. Complainant merely states that these entities are either predecessors, subsidiaries or affiliates. *See, e.g.,* Brief of LDDS Communications, Inc. at 29, n.70 (File No. E-90-233); Formal Complaint of LDDS Communications, Inc. at 2, para. 1 (File No. E-90-233). In the absence of persuasive evidence or information that these subsequently added entities were wholly-owned subsidiaries of the named complainant, we reject complainant's claims for damages for these subsequently added entities.

5. Cincinnati Bell filed a Supplement to the Record on October 23, 1992 which revises the amounts billed to complainant for access services during the 1987-1988 monitoring period. Complainant does not object or contest Cincinnati Bell's revised billing figures. The revised amounts have been taken into account when complainant's damages were recalculated.

6. Communications Services, Inc., *et al.*, (CSI), filed a motion to supplement the record with an affidavit by an officer of this complainant company. In the affidavit, the officer attests to the accuracy of the amount of purchases listed in CSI's briefs based on the complainant company's records. We will grant CSI's motion to supplement the record and will accept the offered affidavits.

7. Complainant failed to "gross-up" traffic sensitive overearnings in its calculations to reflect the effective tax rate during the 1987-1988 monitoring period. Thus, the damage amount does not include a tax gross-up factor.

8. Complainant submitted its damages calculation in its brief filed September 14, 1992. Defendant Cincinnati Bell supplemented the record with a statement of revised billed amounts to the complainant. We accept defendant's supplement to the record and have recalculated complainant's damages using defendant's revised billed amounts.

9. Claiming that it is unable to calculate per category damages without information in the possession of the defendant, complainant US Sprint Communications Company Limited Partnership (Sprint) only provides damages calculations based on overall access overearnings. Sprint states that it would supplement its damages request when its motion to compel responses is granted. In the absence of any other calculations, we accept Sprint's damages calculations based on overall access overearnings during the monitoring period.

10. *See* Brief of Williams Telecommunications Group, Inc. at 6, n.5.

CONTEL CORPORATION

[amounts in dollars]

Contel of Indiana, Inc.

Complainant	DAMAGES [1]	OFFSETS [2]	NET
LDDS Communications, Inc. File No. E-90-238	9,951	-0-	9,951

NOTES FOR CONTEL CORPORATION

1. Complainant erroneously used the overall target rate of return plus buffer of 12.25 percent in computing damages for category overearnings. We note that the target plus buffer rate for category overearnings is 12.40 percent. The overall target plus buffer rate of 12.25 percent is inapplicable to category earnings and the complainant's damages have been recalculated using the correct rate of 12.40 percent.

2. Defendants provided no calculations for offsets.

GTE CORPORATION

[amounts in dollars]

GTE North Incorporated

Complainant	DAMAGES [1]	OFFSETS [2]	NET
LDDS Communications, Inc. File No. E-90-246	144,003	-0-	144,003

GTE Southwest Incorporated

Complainant	DAMAGES [1]	OFFSETS [2]	NET
LDDS Communications, Inc. File No. E-90-247	9,308	-0-	9,308

NOTES FOR GTE CORPORATION

1. Complainant used the overall target rate of return plus buffer of 12.25 percent in computing damages for category overearnings. We note that the target plus buffer rate for category overearnings is 12.40 percent. The overall target plus buffer rate of 12.25 percent is inapplicable to category earnings and the complainant's damages have been recalculated using the correct rate of 12.40 percent.

2. Defendants provided no calculations for offsets.

NYNEX CORPORATION

[amounts in dollars]

New York Telephone Company

Complainant	DAMAGES [1]	OFFSETS [2]	NET
ACC Long Distance Corp. File No. E-90-315	30,940	(28,847)	2,093
Americall Systems of Louisville File No. E-90-012	253	-0-	253
American Network Exchange, Inc., et al. File No. E-91-143			
American Network Exchange, Inc.	-0-	-0-	-0-
Communications Services, Inc.	48,940 [3]	-0-	48,940
Communigroup of K.C., Inc.	105	(77)	28
Dial 'N Save, Inc.	173	(127)	46
Long Distance Service, Inc.	1,744 [3]	-0-	1,744
Metromedia Long Distance, Inc.	9,125 [3]	(58,012)	-0-
RCI Network Services, Inc.	48,655	(423,322)	-0-
TelaMarketing Corp. of Louisiana	211 [3]	-0-	211
Total-Tel USA	2,919 [3]	(5,367)	-0-
Lehigh Valley, Inc.	229	(168)	61
Westel, Inc.	31,280	(110)	31,170

Complainant	DAMAGES [1]	OFFSETS [2]	NET
ATC Long Distance, et al. File No. E-90-082	5,317	(426)	4,891
Cable & Wireless Communications, Inc. File No. E-90-436	59,523	(102,921)	-0-
Charter Network Co., L.P. File No. E-90-274	789	-0- [1a]	789
First Phone of New England File No. E-90-311	990	(649) [1a]	341
LDDS Communications, Inc. File No. E-90-224	6,234	(2,846)	3,388
Litel Telecommunications File No. E-90-328	9,135	(537,231) [4]	-0-
MCI Telecommunications Corp., et al. File No. E-90-442	2,344,223 [5]	(2,637,427)	-0-
Telecom*USA File No. E-91-175	23,072 [5]	(1,756)	21,316
Teledial America, Inc. File No. E-90-262	306 [1a]	(176) [2a]	130
TFN Corp. File No. E-90-208	5,062	(5,300)	-0-
US Sprint Communications Co. L.P. File No. E-90-122	454,521	(2,393,531)	-0-
Westinghouse Communications File No. E-91-126	806	(108) [2a]	698

New England Telephone and Telegraph Company

Complainant	DAMAGES [1]	OFFSETS [2]	NET
ACC Long Distance Corp. File No. E-90-316	17,935	(810)	17,125
American Network Exchange, Inc., et al. File No. E-91-142			
American Network Exchange, Inc.	-0-	-0-	-0-
Communications Services, Inc.	52,126 [3]	-0-	52,126
Communigroup of K.C., Inc.	7	-0-	7
Dial 'N Save, Inc.	25	-0-	25
Long Distance Service, Inc.	2,497 [3]	-0-	2,497
Metromedia Long Distance, Inc.	3,094 [3]	-0-	3,094
RCI Network Services, Inc.	20,388	(8,810)	11,578
TelaMarketing Corp. of Louisiana	62 [3]	-0-	62
Total-Tel USA	2,326 [3]	-0-	2,326
ATC Long Distance, et al. File No. E-90-083	1,122	(106) [6]	1,016
Cable & Wireless Communications, Inc. File No. E-90-428	115,793 [1a]	(9,219)	106,574
Charter Network Co., L.P. File No. E-90-275	204 [1]	-0-	204
First Phone of New England File No. E-90-312	39,627	(2,448)	37,179

Complainant	DAMAGES [1]	OFFSETS [2]	NET
LDDS Communications, Inc. File No. E-90-225	13,934 [1]	-0-	13,934
Litel Telecommunications File No. E-90-329	5,278 [1]	-0-	5,278
MCI Telecommunications Corp., et al. File No. E-90-443	3,348,290 [5]	(1,010,553)	2,337,737
One Call Communications, Inc. File No. E-90-199	106 [1a]	-0-	106
Providence TMC, Ltd. File No. E-91-118	21,354 [1]	-0-	21,354
Telecom*USA File No. E-91-178	16,292 [5]	(3)	16,289
Teledial America, Inc. File No. E-90-263	388	-0-	388
US Sprint Communications Co. L.P. File No. E-90-123	681,684	(1,203,225)	-0-
Westinghouse Communications File No. E-91-127	446	-0-	446

NOTES FOR NYNEX CORPORATION

1. Unless specifically noted, the majority of these damages calculations have been adjusted. The NYNEX telephone companies (New York Telephone Company and New England Telephone and Telegraph Company), in their responses to interrogatories to the complainants generally stated that they did not and could not separate their switched traffic sensitive billings from their "switched access" billings which included charges for carrier common line access services. NYNEX maintains that because of the physical architecture of its network, the customer must incur carrier common line (CCL) charges when purchasing traffic sensitive services. Thus, in its calculations of damages and offsets, NYNEX aggregated the revenues, expenses, rate bases and operating income for both the traffic sensitive and CCL categories. This method is flawed because NYNEX not only combines the revenues and rate base figures from the Form 492, it also combines and averages NYNEX's rate of return percentages, causing an artificial reduction of the "switched access" rate of return. The result is a reduction or elimination of category overearnings. In the cases where this occurs, we have recalculated the damages and offsets (if applicable in the CCL category) utilizing the same ratio that NYNEX purports to use in computing the offset for underearnings in the CCL category.

In some cases, the complainant is able to supply its own billing records for purchases in the traffic sensitive service category. In these cases, complainant's damages calculations have been accepted and have not been adjusted. In many cases, we note that NYNEX used complainant's billing numbers in its "damages" calculations, but erroneously used the aggregate figures from both the traffic sensitive and CCL categories. This improperly skews the damages calculations in NYNEX's favor. These cases are identified as "1a".

2. In connection with note 1 above, we note that offsets for underearnings in the CCL category by New York Telephone (New England Telephone had neither overearning or underearning in the CCL category) have been adjusted using the ratio of CCL service revenues to traffic sensitive and CCL service revenues combined, as provided by NYNEX. As explained above, NYNEX's calculations combined the revenues and billings in the two service categories, thus erroneously reducing the damages award for overearnings in the traffic sensitive category. In these cases, we have recalculated any applicable CCL service offsets.

In some cases, defendants' calculations of CCL underearnings for New York Telephone have been recalculated because the complainant supplied its billing records for that category of access service. In these cases, NYNEX does not dispute these figures and has relied on that complainant's billing records in its "damages" calculations. When this occurred, we have recalculated the offset for the CCL underearning using the complainant's billing figures in the CCL category. These situations are denoted "2a".

Generally, we have accepted NYNEX's offsets from underearnings in the special access service category when presented by NYNEX.

3. American Network Exchange, Inc., *et al.*, (AMNEX) filed a motion to supplement the record with an affidavit by an officer of this complainant company. In the affidavit, the officer attests to the accuracy of the amount of purchases listed in AMNEX's briefs based on the complainant company's records. We will grant AMNEX's motion to supplement the record and will accept the offered affidavits. In addition, we accept complainants' calculation of damages based on category overearnings.

4. This offset amount consists of offsets of $4,170 from carrier common line underearnings and $533,061 from special access services underearnings. Defendants transposed two numerals in its calculations. The special access offset reflects a recomputation of the category's underearnings.

5. We accept complainant's calculations of damages. Unlike other complaints involving NYNEX, in the instant complaints, billing figures provided in defendants' responses to interrogatories purport to be traffic sensitive access services billings alone and do not include carrier common line charges. Thus, complainant's calculations are correct and unadjusted.

6. This amount, proffered by the defendants in their reply brief, is not accurate. It is based on billings in the special access category of approximately $2,000 and the notation to this figure states that it is derived from the defendants' responses to complainant's interrogatories. However, in Attachment A of defendants' responses, it states that it billed a subsidiary of ATC Long Distance $5,549 for special access service over the course of the monitoring period. Because defendants have failed to reconcile these different figures, we will accept the figure for the offset in the special access service category based on $2,000 of billings proffered in defendants' reply brief.

PACIFIC TELESIS GROUP

[amounts in dollars]

Pacific Bell Telephone Company

Complainant	DAMAGES [1]	OFFSETS	NET
American Network Exchange, Inc., et al. File No. E-91-144			
American Network Exchange, Inc.	36,497	-0-	36,497
Communications Services, Inc.	517,731 [2]	-0-	517,731
Long Distance Service, Inc.	35,926	-0-	35,926
Metromedia Long Distance, Inc.	40,654 [2]	-0-	40,654
National Tele-Services, Inc.	-0-	-0-	-0-
TelaMarketing Corp. of Louisiana	497 [2]	-0-	497
Total-Tel USA	3,623 [2]	-0-	3,623
Westel, Inc.	4,081	-0-	4,081
ATC Long Distance, et al. File No. E-91-066	56,150 [3]	-0-	56,150

Complainant	DAMAGES [1]	OFFSETS	NET
Automated Communications, Inc. File No. E-91-174	1,417	-0-	1,417
Cable & Wireless Communications, Inc. File No. E-91-021	218,000 [3]	-0-	218,000
LDDS Communications, Inc. File No. E-90-229	61,000 [3, 4]	-0-	61,000
Litel Telecommunications, Inc. File No. E-90-333	34,218	-0-	34,218
One Call Communications, Inc. File No. E-90-198	455 [5]	-0-	455
Westinghouse Communications File No. E-91-129	-0- [6]	-0-	-0-
Williams Telecommunications Group, Inc. File No. E-90-454	49,000 [7]	-0-	49,000

NOTES FOR THE PACIFIC TELESIS GROUP

1. Unless otherwise noted, complainants erroneously used the overall target rate of return plus buffer of 12.25 percent in computing damages for category overearnings. We note that the target plus buffer rate for category overearnings is 12.40 percent. The overall target plus buffer rate of 12.25 percent is inapplicable to category earnings and the complainant's damages have been recalculated using the correct rate of 12.40 percent.

Where complainants have correctly calculated damages due to category overearnings, their unadjusted, uncorrected damage awards are identified "1a".

2. Pacific Bell states that it does not have any billing records for access services during the 1987-1988 monitoring period for this complainant. Reply Brief of Pacific Bell at 16 (File No. E-91-144). American Network Exchange, Inc., *et al.*, (AMNEX) filed a motion to supplement the record with an affidavit by an officer of this complainant company attesting to the accuracy of the amount of purchases listed in AMNEX's briefs based on the complainant company's records. We will grant AMNEX's motion to supplement the record and will accept the offered affidavits. Furthermore, we accept the complainant's calculation of damages with regard to this complainant company.

3. Pacific Bell Telephone Company (Pacific Bell) notes that rather than using the rate of return prescription plus buffer for the access categories, 12.40 percent, complainant incorrectly calculated its damages using the overall access rate of return prescription plus the permitted buffer when it calculates damages in the access categories. *See, e.g.*, Reply Brief of Pacific Bell at 11, File No. E-91-021. In addition, Pacific Bell disputes the billing amounts in the access categories set forth by complainant in its calculations in its initial brief. Pacific Bell also states that complainant failed to take an FCC-ordered refund into account when calculating damages. In the absence of additional information or evidence, we accept Pacific Bell's calculations of complainant's damages in the access categories.

4. Pacific Bell argues that complainant's calculations of damages have been incorrectly computed because complainant includes claims for companies who have filed separate Section 208 complaints in this proceeding. To the extent a company is a complainant in separate rate of return complaint for the 1987-1988 monitoring period, we reduce the instant award to reflect an award in the other rate of return complaint proceeding.

5. Pacific Bell argues that it has no record of billings or purchases for interstate access service during the monitoring period for this complainant. We note, however, that in a parallel, separate rate of return complaint involving LDDS Communications, Inc. (File No. E-90-229), Pacific Bell admits billing records in the traffic sensitive category under the ACNA "TAM" for One Call Communications. Reply Brief of Pacific Bell at Exhibit 2 (File No. E-90-229). Therefore, we have recalculated complainant's damages using this billing figure and correcting for complainant's use of the incorrect rate of return prescription for overall interstate service.

6. Pacific Bell states that it does not have any billing records for access services during the 1987-1988 monitoring period for this complainant. Reply Brief of Pacific Bell at 12 (File No. E-91-129). To support its claim that it did not bill any access services to complainant during the monitoring period in question, Pacific Bell notes that during discovery, complainant provided photocopies of invoices purporting to be for access services to defendant, but Pacific Bell contends that the invoices are for message toll service and not for interstate access services. Complainant did not file a supplementary pleading disputing Pacific Bell's contentions although given ample opportunity to develop a comprehensive record upon which damages could be determined with a reasonable degree of certainty. Consequently Westinghouse Communications has failed to provide the Commission with persuasive evidence to support an award of damages. We do find, however, that Pacific Bell is liable for exceeding the Commission's rate of return prescription for the 1987-1988 monitoring period.

7. *See* Brief of Williams Telecommunications Group, Inc. at 6, n.5 (File No. E-90-454).

SOUTHWESTERN BELL TELEPHONE COMPANY

[amounts in dollars]

Complainant	DAMAGES [1]	OFFSETS [2]	NET
American Network Exchange, Inc., et al. File No. E-91-148			
American Network Exchange, Inc.	-0- [3]	-0-	-0-
Contact America, Inc.	2 [6]	-0-	2
Long Distance Service, Inc.	-0-	-0-	-0-
National Tele-services, Inc.	20 [6]	-0-	20
Telamarketing Corp. of Louisiana	307 [4, 5]	-0-	307
Total-Tel USA	289 [5]	-0-	289
LDDS Communications, Inc. File No. E-90-232	837,081 [6]	-0-	837,081
Teledial America, Inc. File No. E-90-266	97	-0-	97

NOTES FOR SOUTHWESTERN BELL TELEPHONE COMPANY

1. Unless otherwise noted, complainants used the overall target rate of return plus buffer of 12.25 percent in computing damages for category overearnings. We note that the target plus buffer rate for category overearnings is 12.40 percent. The overall target plus buffer rate of 12.25 percent is inapplicable to category earnings and the complainant's damages have been recalculated using the correct rate of 12.40 percent.

Where complainants have correctly calculated damages due to category overearnings, their unadjusted, uncorrected damage awards are identified "1a".

2. Southwestern Bell Telephone Company (Southwestern) provided no offsets calculations in the relevant proceedings regarding these complainants.

3. Complainant states that it makes no claim for damages on behalf of American Network Exchange, Inc. (AMNEX) because defendant has failed to provide complete information in response to interrogatories with regard to purchases of interstate access services by AMNEX. Complainant claims that it will file damages calculations for AMNEX once it has a complete response to its interrogatory request. To date, no supplemental damages calculation has bee submitted by complainant.

4. Under the direction of Telamarketing Corp. of Louisiana (Telamarketing), complainant states that seeks dismissal of that portion of Telamarketing's complaint regarding damages for overearnings in the special access service category. Reply Brief of American Network Exchange, Inc., *et al.* at 2, n.2 (File No. E-91-148). However, to date, no motion for dismissal on behalf of Telamarketing has been filed in connection with this statement. In its reply brief, complainant makes no claim for damages on behalf of Telamarketing for overearnings in the special access service category.

5. AMNEX filed a motion to supplement the record with an affidavit by an officer of this complainant company. In the affidavit, the officer attests to the accuracy of the amount of purchases listed in AMNEX's briefs based on the complainant company's records. We will grant AMNEX's motion to supplement the record and will accept the offered affidavits.

6. We note that Southwestern asserts that LDDS Communications, Inc. (LDDS) has overstated its damages claim by overstating the amount of switched and special access revenue Southwestern billed LDDS. Specifically, Southwestern claims that LDDS included amounts billed to companies who filed separate complaints and with whom Southwestern had already settled. Some of these settlements, however, are of complaints involving violations of the 1985-86 rate of return prescription and do not affect damages claims for the 1987-1988 period. It appears in one instance, however, that the settlement concerns a complaint filed by ATC Long Distance (ATC) for rate of return prescription violations for the the 1987-1988 monitoring period. *See* Advanced Telecommunications Corporation, *et al.* v. Southwestern Bell Telephone Company, 7 FCC Rcd 6251 (Com.Car.Bur. 1992). LDDS has not disputed that the complaint on behalf of ATC has been settled. The amount of the settlement is not before the Commission. Therefore, we direct LDDS and Southwestern to deduct the settlement amount from the damages awarded here. Southwestern filed an amendment to its interrogatories in File No. E-91-148 in which it stated that complainants Contact America, Inc. and National Teleservices, Inc. should not recover damages in File No. E-91-148 because these complainants are recovering in File No. E-90-232, a complaint filed by LDDS. This statement has not been challenged by complainants. Accordingly, since the LDDS damages award is not broken down by separate complainants, we deduct $22 from the damages award to LDDS in File No. E-90-232 to avoid a double recovery of damages by Contact America, Inc. and National Teleservices, Inc.

US WEST COMMUNICATIONS, INC.

[amounts in dollars]

Mountain States Telephone and Telegraph Company

Complainant	DAMAGES [1]	OFFSETS [2]	NET
American Network Exchange, Inc., et al. File No. E-91-140			
American Network Exchange, Inc.	-0- [3]	-0-	-0-
TelaMarketing Corp. of Louisiana	-0- [3]	-0-	-0-
Total-Tel USA	-0- [3]	-0-	-0-
Litel Telecommunications, Inc. File No. E-90-330	548 [4]	-0-	548
Williams Telecommunications Group, Inc. File No. E-90-451	89,000 [5]	-0-	89,000

Northwestern Bell Telephone Company

Complainant	DAMAGES [1]	OFFSETS [2]	NET
American Network Exchange, Inc., et al. File No. E-91-141			
Telephone Associates Long Distance Services, Inc.	-0- [3]	-0-	-0-
U.S. Link	-0- [3]	-0-	-0-
Litel Telecommunications, Inc. File No. E-90-331	3,758 [4]	-0-	3,758
Williams Telecommunications Group, Inc. File No. E-90-452	122,000 [5]	-0-	122,000

Pacific Northwest Bell Telephone Company

Complainant	DAMAGES [1]	OFFSETS [2]	NET
Litel Telecommunications, Inc. File No. E-90-332	-0- [6]	-0-	-0-

NOTES FOR US WEST COMMUNICATIONS, INC.

1. Unless otherwise noted, complainant erroneously used the overall target rate of return plus buffer of 12.25 percent in computing damages for category overearnings. We note that the target plus buffer rate for category overearnings is 12.40 percent. The overall target plus buffer rate of 12.25 percent is inapplicable to category earnings and the complainant's damages have been recalculated using the correct rate of 12.40 percent.

Where complainants have correctly calculated damages due to category overearnings, their unadjusted, uncorrected damage awards are identified "1a".

2. Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (USWC) did not provide any calculations for offsets.

3. On October 19, 1992, USWC filed an unopposed motion requesting that complainants American Network Exchange, Inc., TelaMarketing Corp. of Louisiana, Totel-Tel USA, and U.S. Link be dismissed from the complaint because USWC could find no evidence that these complainants purchased service from USWC. Complainants Total-Tel and U.S. Link indicated that they would be filing a motion to dismiss with respect to their claims against USWC. *See* Complainants' Initial Brief at 10. The Commission has not received their motion. Accordingly we grant USWC's motion to dismiss. This leaves only Telephone Associates Long Distance Services, Inc. (TALDS). After a thorough review of the record, we have determined that TALDS has failed to sustain its burden of proving damages. The parties were given ample opportunity to develop a comprehensive record upon which damages could be determined. TALDS has failed to provide the Commission with evidence to support an award of damages.

4. We will not award Litel damages from USWC for switched traffic sensitive purchases. Litel has not submitted evidence of damages in sufficient detail to enable the Commission to determine the amount of excess purchases from each of the respective defendants. Rather, Litel submitted calculations combining switched traffic sensitive purchases from each of the USWC for the relevant period. For damages in the special access category area, in absence of evidence by the complainant substantiating the accuracy of the amounts it claims to have been billed, we are accepting USWC's adjustments of these figures.

5. Complainant Williams Telecommunications Group, Inc. (WTG) requests that the Commission bifurcate this proceeding and upon finding for WTG on the issue of liability, order USWC to respond completely to WTG's interrogatories. In the alternative, WTG accepts the amount of damages calculated by the defendant for each of its individual operating companies. As the Commission made clear in its Discovery Orders, there will be no further bifurcation of these proceedings and we use WTG's acceptance of defendant's calculations to determine the damages award to which it is entitled.

6. Complainant Litel made no damages claim against Pacific Northwest Bell Telephone Company as an individual operating company, and accordingly, no claim will be awarded.

THE UNITED TELEPHONE COMPANIES

[amounts in dollars]

United Telephone Company of the Carolinas

Complainant	DAMAGES [1]	OFFSETS [2]	NET
American Network Exchange, Inc., et al. File No. E-91-149			
Communications Services, Inc.	-0- [3]	-0-	-0-

United Telephone Company of Indiana, Inc.

Complainant	DAMAGES [1]	OFFSETS [2]	NET
American Network Exchange, Inc., et al. File No. E-91-150			
Communications Services, Inc.	8,000	-0-	8,000

United Inter-Mountain Telephone Company

Complainant	DAMAGES [1]	OFFSETS [2]	NET
American Network Exchange, Inc., et al. File No. E-91-151			
Communications Services, Inc.	6,000	-0-	6,000

United Telephone Company of New Jersey, Inc.

Complainant	DAMAGES [1]	OFFSETS [2]	NET
American Network Exchange, Inc., et al. File No. E-91-152			
American Network Exchange, Inc.	-0- [4]	-0-	-0-
Communications Services, Inc.	1,000	-0-	1,000

United Telephone Company of the Northwest

Complainant	DAMAGES [1]	OFFSETS [2]	NET
American Network Exchange, Inc., et al. File No. E-91-153			
Communications Services, Inc.	2,997 [5]	-0-	2,997

United Telephone Company of Ohio

Complainant	DAMAGES [1]	OFFSETS [2]	NET
American Network Exchange, Inc., et al. File No. E-91-154			
Communications Services, Inc.	-0- [6]	-0-	-0-

United Telephone Company of Pennsylvania

Complainant	DAMAGES [1]	OFFSETS [2]	NET
American Network Exchange, Inc., et al. File No. E-91-155			
American Network Exchange, Inc.	-0- [4]	-0-	-0-
Communications Services, Inc.	-0- [6]	-0-	-0-

United Telephone Company of Kansas, Inc.

Complainant	DAMAGES [1]	OFFSETS [2]	NET
American Network Exchange, Inc., et al. File No. E-91-156			
Communications Services, Inc.	-0- [6]	-0-	-0-

NOTES FOR THE UNITED TELEPHONE COMPANIES

1. We accept defendant's calculations of damages except where defendant shows a damages amount of zero and we agree with complainant that it properly has a claim against the parties named. Unlike the defendants, the complainant shows no calculations to support its claims and it is, therefore, not possible to check the accuracy of complainant's figures or to discern their source.

2. Defendants provided no calculations for offsets.

3. We will not allow complainant to recover damages from United Telephone Company of the Carolinas. Complainant's damages claim is based upon overearnings by Carolina Telephone & Telegraph Company, which is not a party to this proceeding.

4. We note that complainant American Network Exchange, Inc. (AMNEX) requested dismissal of its claims against defendant in complainants' Reply to Answer at 7, n.2. Accordingly, we grant AMNEX's request for dismissal from the complaint.

5. We will allow complainant to recover against United Telephone Company of the Northwest for purchases made by Amnet. Complainant has provided evidence that Amnet was merged into ITT Communications Services, Inc. in December 1988. ITT Communications Services, Inc. subsequently changed its name to Communications Services, Inc. (CSI). Amnet no longer exists as a legal entity and cannot pursue its claims against defendant apart from CSI. Therefore, it is not a separate party to these proceedings.

6. Complainant claimed no damages from defendant.

APPENDIX D

Effective Period	Rate	Internal Revenue Service Citation
01/01/87 - 03/31/87	8%	Rev.Rul. 146, 1986-2 C.B. 208
04/01/87 - 06/30/87	8%	Rev.Rul. 87-23, 1987-13 I.R.B. 46
07/01/87 - 09/30/87	8%	Rev.Rul. 87-62, 1987-29 I.R.B. 10
10/01/87 - 12/31/87	9%	Rev.Rul. 87-87, 1987-36 I.R.B. 8
01/01/88 - 03/31/88	10%	Rev.Rul. 87-131, 1987-50 I.R.B. 6
04/01/88 - 06/30/88	9%	Rev.Rul. 88-17, 1988-10 I.R.B. 6
07/01/88 - 09/30/88	9%	Rev.Rul. 88-50, 1988-25 I.R.B. 39
10/01/88 - 12/31/88	10%	Rev.Rul. 88-86, 1988-41 I.R.B. 1
01/01/89 - 03/31/89	10%	Rev.Rul. 88-105, 1988-51 I.R.B. 4
04/01/89 - 06/30/89	11%	Rev.Rul. 89-36, 1989-1 C.B. 309
07/01/89 - 09/30/89	11%	Rev.Rul. 89-69, 1989-1 C.B. 310
10/01/89 - 12/31/89	10%	Rev.Rul. 89-99, 1989-2 C.B. 256
01/01/90 - 03/31/90	10%	Rev.Rul. 89-125, 1989-2 C.B. 257
04/01/90 - 06/30/90	10%	Rev.Rul. 90-19, 1990-1 C.B. 186
07/01/90 - 09/30/90	10%	Rev.Rul. 90-47, 1990-1 C.B. 187
10/01/90 - 12/31/90	10%	Rev.Rul. 90-71, 1990-35 I.R.B. 4
01/01/91 - 03/31/91	10%	Rev.Rul. 90-94, 1990-46 I.R.B. 16
04/01/91 - 06/30/91	9%	Rev.Rul. 91-20, 1991-11 I.R.B. 1
07/01/91 - 09/30/91	9%	Rev.Rul. 91-33, 1991-21 I.R.B. 1
10/01/91 - 12/31/91	9%	Rev.Rul. 91-50, 1991-37 I.R.B. 1
01/01/92 - 03/31/92	8%	Rev.Rul. 91-65, 1991-51 I.R.B. 1
04/01/92 - 06/30/92	7%	Rev.Rul. 92-21, 1992-14 I.R.B. 14
07/01/92 - 09/30/92	7%	Rev.Rul. 92-44, 1992-24 I.R.B. 86
10/01/92 - 12/31/92	6%	Rev.Rul. 92-77, 1992-38 I.R.B. 12

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Commission Requirements
for Cost Support Material
To Be Filed with 1993 Annual
Access Tariffs

ORDER

Adopted: February 18, 1993; Released: February 18, 1993

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. This Order sets forth certain requirements for summary cost support material that local exchange carriers (LECs) must file to support their annual access charge tariff filings on or before April 2, 1993 in partial fulfillment of the requirements established in Sections 61.38 and 61.41 through 61.49 of the Commission's Rules.[1] Specific data formats are detailed in the Tariff Review Plans (TRPs), and are appended to this Order.[2] The TRPs display basic cost, demand, and rate information in a manner that is consistent for all LECs, thereby aiding review by the Commission and interested parties of the LECs' required annual access tariff filings. The TRPs have served this purpose effectively in past years.

A. Background

2. The background concerning the development of previous TRPs can be found in our previous TRP Orders.[3] Based on our continued experience in reviewing the LECs' interstate access tariffs and in evaluating the usefulness of the TRP data provided by the LECs in previous filings, and based on various changes in the Commission's Rules and other changes,[4] it is necessary to modify last year's information requirements in certain respects. These modifications were developed from informal discussions with representatives of the LECs and other members of the industry and comments on improvements and modifications to the 1992 TRP filed by interested parties.[5]

B. Price Cap Carriers

3. In the *LEC Price Cap Order*,[6] the Commission adopted mandatory price cap regulation for the regional Bell Operating Companies (RBOCs)[7] and for GTE Telephone Operating Companies (GTOC). Effective January 1, 1991, United Telephone Companies (United) and Contel Corporation (Contel) also elected to file as price cap carriers. In the 1991 annual filings, made April 2, 1991, Southern New England Telephone Company (SNET) and Rochester Telephone Corporation (Rochester) also elected to file as price cap carriers. The rules require these carriers to make their 1993 annual access tariff filing under the price cap rules.[8] Any other carrier that wishes to elect price cap regulation may do so as part of its 1993 annual filing. A carrier subject to price caps or electing price caps in this filing must file the price cap TRP outlined in Section II of this Order.

C. Rate of Return Carriers

4. Carriers that have not been previously subject to price cap regulation and those carriers that do not elect price cap treatment for annual access year 1993 remain subject to rate of return regulation. Carriers subject to rate of return regulation are required to file either the Tier 1 or Tier 2 TRP as outlined in Sections III and IV, respectively, of this Order.

1. Definition of Tier 1 and Tier 2 Companies

5. The Bureau has previously noted that the LECs' ability to provide cost, demand, and revenue data varies de-

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[1] 47 C.F.R. §§ 61.38 and 61.41 through 61.49. Compliance with the requirements set forth in this Order does not ensure acceptance of carriers' access charge tariffs or replace total support material requirements. Carriers remain obligated to provide adequate supporting documentation for their access charges.

[2] The TRP formats are developed for the specific circumstances of the calendar year in which the tariffs will become effective. Thus, the TRPs discussed in this Order, which will accompany the April 2, 1993, access tariff filings scheduled to become effective on July 1, 1993, will be referred to as the 1993 TRPs.

[3] *See, e.g.*, Commission Requirements for Cost Support Material To Be Filed with 1992 Annual Access Tariffs, 7 FCC Rcd 1033 (1992) (*1992 TRP Order*).

[4] *See, e.g.*, Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the Commission's Rules), DA 91-143 (released February 13, 1991). *See also* Policy and Rules Concerning Rates for Dominant Carriers, and Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket Nos. 87-313 and 89-79, 6 FCC Rcd 4524 (1991) (*Part 69/ONA Order*); *recon*, 7 FCC Rcd 5235 (1992).

[5] *See* Common Carrier Bureau Solicits Comments Regarding Modifications and Improvements to the Tariff Review Plan, DA 92-1699, Public Notice (released December 16, 1992) (*December 16 Public Notice*). Comments in response to the *December 16 Public Notice* were filed on January 6, 1993, by Ameritech Services (Ameritech), American Telephone and Telegraph Company (AT&T), Bell Atlantic Telephone Companies (Bell Atlantic), Bell South Corporation (Bell South), NYNEX Telephone Companies (NYNEX), Southwestern Bell Telephone (Southwestern), and United States Telephone Association (USTA).

[6] *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 5 FCC Rcd 6786 (1990) (*LEC Price Cap Order*).

[7] The RBOCs are Ameritech Operating Companies (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), Bell South Corporation (Bell South), New York Telephone Company and New England Telephone and Telegraph Company (NYNEX), Pacific Bell and Nevada Bell (Pactel), Southwestern Bell Telephone Company (Southwestern), and US West Communications, Inc. (US West).

[8] *See* 47 C.F.R. § 61.41(d).

pending on the size of the company.[9] In previous TRP Orders, we have divided the LECs into two categories, Tier 1 operating companies and Tier 2 operating companies, and devised a different set of summary data requirements for each.

6. We are retaining, for carriers subject to rate of return regulation, the definitions of Tier 1 and Tier 2 companies used in the *1992 TRP Order*. Tier 1 and Tier 2 companies are defined by applying the criterion that Sections 32.11(a) and 32.11(e) of the Commission's Rules used to distinguish Class A and Class B companies, respectively. Class A companies are those companies having annual revenues from regulated telecommunications operations of $100 million or more; Class B companies are those companies having annual revenues from regulated telecommunications operations of less than $100 million. The initial classification of a company is determined by its lowest annual operating revenues for the five immediately preceding years. A carrier's classification is changed when its annual operating revenue exceeds or is under the $100 million mark in each of five consecutive years. Tier 1 companies are those Class A companies which are not subject to price cap regulation by either Commission Order or election, and Tier 2 companies are those Class B companies which are not subject to price cap regulation by either Commission Order or election.

7. The Bureau in past TRP Orders had distinguished smaller Tier 2 LECs from the larger Tier 2 LECs by applying the definition of small telephone company study areas adopted in the *Small Telephone Company Order*.[10] We then adopted different TRPs and different test years for the larger Tier 2 companies and the small telephone companies. For purposes of this Order, small telephone companies are differentiated as in the *1992 TRP Order*. Thus, small telephone companies, also denoted Tier 2B companies, are those Tier 2 companies which are in National Exchange Carrier Association (NECA) Subset 3 and which serve 50,000 or fewer access lines.[11] All other Tier 2 companies are designated Tier 2A. Only companies which file rates based on prospective costs and demand and do not concur in the NECA traffic sensitive tariff are required to file TRPs.

2. Definition of Test Year and Past Year Cost of Service Period

8. The Commission's Rules require carriers not subject to price cap regulation and not eligible for small telephone company treatment to submit, in support of their proposed rates, a past year cost of service (PYCOS) study for the most recent 12-month period and a study projecting costs for a representative 12-month period (test year).[12] Those rules also require that access rates be targeted to earn the authorized rate of return.[13] Rates filed to be effective July 1, 1993 are expected to remain in effect through June 30, 1994. Therefore, we are adopting the period July 1, 1993 through June 30, 1994, as the test year for Tier 1 and Tier 2A LECs. All ratemaking for Tier 1 and Tier 2A LECs must be based upon test year projections. We also direct Tier 1 and Tier 2A LECs to submit PYCOS data for the period January 1, 1992 through December 31, 1992. As discussed below, NECA must also use this PYCOS year and test period.

9. Tier 2B telephone companies have the option of filing subject to alternative cost support requirements as established in the *Small Telephone Company Order*. Small telephone companies may file access tariffs for their traffic sensitive rates every other year, using the following optional cost support and ratemaking methods: (1) a company must compute rates, for the first access filing, based on a "cost of service study for all elements for the most recent 12-month period with related demand for the same period", and for subsequent access filings, based on a "cost of service study for all elements for the total period since the local exchange carrier's last filing, with related demand for the same period"[14] (2) cost support need not be submitted with the filing; and (3) the Commission may require a company to submit such support information.

10. Small telephone companies may adopt the test period (July 1, 1993 through June 30, 1994) and PYCOS period (January 1 through December 31, 1992) required of the Tier 1 and Tier 2A telephone companies in this Order. Under this option, small telephone companies that elect to use a prospective test year for their 1993 annual access tariff filing must submit the cost support data required by this Order for Tier 2A companies.[15]

11. For the 1993 annual access tariff filings, small telephone companies that elect to file rates based on historical costs as outlined above must base their rates on a cost of service study for the entire period two-year since their 1991 annual access tariff filing.[16] Such companies need not submit supporting data at the time of filing, but should be prepared to submit the data promptly upon request by the

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[9] *See* Commission Requirements for Cost Support Material To Be Filed with Access Tariffs on March 1, 1985, Public Notice, Mimeo No. 2133 (released Jan.25, 1985) (*January 25 Public Notice*).

[10] Regulation of Small Telephone Companies, CC Docket No. 86-467, FCC 87-186, released June 29, 1987, recon. pending (*Small Telephone Company Order*). *See also* 47 C.F.R. §§ 61.39(a) and (b), 69.602.

[11] *See* 47 C.F.R. § 69.602 for a definition of the subsets that vote separately for NECA directors.

[12] *See* 47 C.F.R. § 61.38(b)(1).

[13] *See* 47 C.F.R. §§ 69.2(b) and (z).

[14] 47 C.F.R. §§ 61.39(b)(1)(i) and (ii).

[15] Some companies that, on their own, would qualify as Tier 2B companies are classified as Tier 2A companies because they are affiliated with companies that are NECA Subset 2 companies or that have study areas of greater than 50,000 access lines. Companies that would be Tier 2B companies except for such affiliation must use the July 1, 1993 through June 30, 1994 prospective test year and furnish PYCOS data for calendar year 1992.

[16] Thus, a small telephone company which based its 1991 annual access year rates on historical data through December 1990 should use historical data for the period January 1, 1991 through December 31, 1992 for its 1993 filing. Any small telephone company which filed its first access filing in the 1992 annual access tariff filing, and wishes to file using the optional procedures for small telephone companies, must file using historical data for the entire period since the end of its last historical period. For example, if the company filed on April 2, 1992 using an historical period which ended on December 31, 1991, the historical period the company should use in this filing is January 1, 1992 through December 31, 1992. *See* 47 C.F.R. § 69.3(f).

Commission or interested parties.[17] Small telephone companies that elect to file traffic sensitive rates based on historical cost of service studies for the first time should use data for January 1, 1992, through December 31, 1992.

II. PRICE CAP TARIFF REVIEW PLAN

12. With some changes, the price cap TRP used for the 1992 annual access tariff filings is being adopted for price cap LECs for the 1993 annual access tariff filings. In the following paragraphs, we discuss the purpose of, and changes to, the price cap TRP charts. Attachment A of this Order provides the charts for the price cap TRP.

13. In the *Expanded Interconnection Order*.[18] the Commission required the price cap and Tier 1 rate of return companies to offer expanded interconnection to all interested parties. The Commission also allowed the companies additional pricing flexibility for their DS-1 and DS-3 special access rates once an interconnector is operating in a state. Specifically, the companies were allowed to disaggregate these rates based on zone density plans, subject to certain price cap restrictions. As discussed below, we have modified several charts in the price cap TRP in order to report subindexes for the zone density plan and upper and lower limits for these subindexes.

14V. In the *800 Rate Structure Order*,[19] the Commission required LECs to price basic 800 data base service on a per query basis, and required that LECs subject to price cap regulation place associated rate subelements in a new separate service category within the Traffic Sensitive Basket.[20] Therefore, we have modified Charts IND-1, SUM-1, and RTE-1, to include this new service category.

15. USTA commented that the 45 day estimate of GNP-PI will be unavailable at the time the price cap TRP is being prepared.[21] USTA requests that the Commission authorize LECS to use GDP-PI in calculating the price cap indexes and consider a permanent change to GDP-PI in TRP requirements. USTA maintains that the cost of revising data once GNP-PI figures are available could be avoided without loss of accuracy.

16. As in the 1992 annual access filing, LECs may use growth in the GDP-PI from the fourth quarter of 1991 to the fourth quarter of 1992 in place of the GNP-PI to make their 1993 annual access filing. Because the national income accounting concepts on which these two indexes are based are similar, we expect them to be approximately equal. However, the exact relationship between these two indexes is unclear at this time. Therefore, in order to ensure compliance with price cap rules, when the 75-day estimate of the GNP-PI is released, adjustments must be made to the filings to reflect the inflation rate as measured by the GNP-PI, if this inflation rate differs from the inflation rate measured from the GDP-PI. This is the same procedure used in the 1992 annual access filings when the 45 day estimate of GNP-PI was unavailable.

17. LECs are required in the 1993 annual access filing to report all data, except rates, in full units of measure with zero decimal places. Individual rates must be reported to the number of decimal places reflected in the company's tariffs.[22]

A. Chart IND-1

18. This is a slightly modified version of the Chart IND-1 in the 1992 TRP. This chart displays the existing Price Cap Indexes (PCIs), Actual Price Indexes (APIs), Service Band Indexes (SBIs), the DS1 and DS3 special access subindexes, and the new upper and lower bands on the SBIs and subindexes. In the 1993 TRP, we have added rows to report zone density plan indexes for DS1 and DS3 rates, within the Special Access Basket, and upper and lower bands. There is also an additional row to report indexes for 800 Services. This is a new category within the Traffic Sensitive Basket. Row numbers change for some line items as a result of adding the rows.

B. Chart CCL-1

19. This chart details the computation needed to derive the new cap on the Carrier Common Line (CCL) rates. It displays base period CCL and Subscriber Line Charge (SLC) demand and rates and computes the new cap on CCL rates according to the formula contained in Section 61.46(d). This level of detail is necessary in order to allow us to verify whether a carrier correctly computed CCL PCI.

C. Chart PCI-1

20. This chart provides the data needed to compute, and the computation of, the PCI for the four baskets. It displays, by basket, the following variables: (1) GNP-PI, the Gross National Product Price Index, the measure of inflation; (2) X, the productivity factor;[23] (3) Y, the access expense at the last update of the PCI;[24] (4) the change in access expense; (5) the change in exogenous costs; (6) R, base period revenue;[25] (7) w, the weighing factor used in computing the PCI; and (8) g, the growth in minutes per line.[26]

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[17] See 47 C.F.R. § 61.39(b).

[18] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992) (*Expanded Interconnection Order).*

[19] *See* In the Matter of Provision of Access for 800 Service, CC Docket No. 86-10, FCC 93-53 (released January 29, 1993) (*800 Rate Structure Order).*

[20] The *800 Rate Structure Order* also set forth certain requirements concerning the pricing of optional vertical features. These features will be treated as new services when introduced and, thus, will not be incorporated in the 1993 annual access filings.

[21] *See* USTA Comments at 2-3.

[22] In certain cases, the rates reported on chart RTE-1 may be aggregate rates, *i.e.,* an average of several rates. In those cases, rates should be displayed to six decimal places.

[23] This must have the value 3.3 percent in the Common Line, Traffic Sensitive Switched, and Special Access Baskets, and 3.0 percent in the Interexchange basket; or, if the company has chosen the higher productivity factor, 1.0 percentage points higher in each of these baskets. Choice of the higher productivity factor will affect the level at which sharing or low end adjustment may occur in the 1994 annual filing.

[24] *See* 47 C.F.R. § 61.44(b).

[25] *Id.*

[26] *See* 47 C.F.R. § 61.45(c). Companies must also provide in the workpapers accompanying their filings the detailed data used to compute g, *i.e.,* both carrier common line minutes of use and number of subscriber lines for 1991 and 1992. This data

21. Several LECs suggested that we add to this chart a hypothetical PCI, which would be computed excluding the sharing or low end adjustment. This hypothetical PCI would be used in next year's annual access filing to reverse the one time effect of the sharing or low end adjustment amount.[27] We believe this hypothetical PCI is unnecessary.[28] The one time effect can be removed by an exogenous adjustment of the same size as, but the opposite sign of, the exogenous adjustment which instituted the sharing or low end adjustment amount last year, as discussed below. The mathematical difference in the procedure suggested in the comments and the one adopted is *de minimis* and the procedure adopted is accurate and less burdensome for all parties.

D. Chart SUM-1

22. This chart provides base period (calendar year 1992) demand multiplied by current rates and proposed rates, and the difference between the two, for each basket and service category. We have modified the chart this year to include calculations for the new service category of 800 Services. This modification resulted in changed row numbers for several line items in this chart.

E. Chart EXG-1

23. This chart, modified since the 1992 TRP, provides supporting data for computation of the exogenous change amounts used to compute the PCIs. It displays, by basket, cost data on exogenous changes for the Subscriber Plant Factor (SPF), Dial Equipment Minutes (DEM) transition, long term and transitional support, inside wire amortizations, reserve deficiency amortizations, excess deferred taxes, investment tax credit amortizations, and the sharing or low end adjustment based on earnings in calendar 1992.

24.Two new columns are included in the 1993 TRP for the removal and revision of the sharing or low end adjustment reported in the 1992 TRP.[29] One of the new columns (Column H) displays the removal of the sharing or low end adjustment from the prior year's TRP.[30] The other column (Column I) displays revisions to the sharing or low end adjustment originally reported in the 1992 TRP. The total of the two columns will reflect earnings reported in the final Form 492 for 1991. [31]

25. Carriers are required to base this year's sharing or low end adjustment on earnings in calendar year 1992. The level of sharing or low end adjustment for the second half of 1992 shall be computed based on the productivity factor chosen in the 1992 annual filing, and the level for the first half of 1992 shall be computed based on the productivity factor in the 1991 annual filing.

26. Carriers are required to submit their Form 492 for calendar year 1992 as part of their cost support. In addition, carriers must provide full documentation in their workpapers of their computations of the sharing or low end adjustment amount and of the method used to allocate the amount among the baskets. As in the 1992 annual access filings, carriers shall remove the earnings of services excluded for price cap treatment based on the assumption that these services earned the same rate of return as interstate services.

27. Companies are required to include additional data in workpapers on exogenous changes for Reserve Deficiency Amortization (RDA), Inside Wire Amortization (ISW), Excess Deferred Taxes (EDT), and Investment Tax Credit Amortization (ITC). For both ISW and RDA, these data must provide, by state and by tariff entity, the expenses in the July 1, 1992 through June 30, 1993 tariff year and the July 1, 1993 through June 30, 1994 tariff year, the expense difference between those two years, the percent of the expenses allocated to each of the four baskets, and the total expenses allocated to each of the four baskets. For both EDT and ITC, companies must provide, by tariff entity, the total company and interstate amounts for calendar 1992 and the July 1, 1993 through June 30, 1994 tariff year.

F. Chart RTE-1

28. This chart, modified since last year's version, displays aggregate data which can be used to compute the APIs, SBIs, and subindexes. This chart displays base period (calendar year 1992) demand, current rates, proposed rates, and revenues computed by multiplying base period demand by current and by proposed rates. There are also columns for the display of rates effective at the time of the last update of the PCI and revenue computed by multiplying base period demand by these rates. This enables us to verify the accuracy of the computation of "R", the variable in the PCI formula that equals base period demand multiplied by rates, and the PCIs. The chart also displays the APIs, SBIs, and subindexes. The data reported on this chart are above the rate element level of detail.[32] The aggregate format of chart RTE-1 is necessary to allow rapid, consistent verification of the computation of the indexes across all companies.

29. This year's chart includes three modifications.[33] First, the chart includes a row for Other Common Line on Page

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for 1991 should match the data filed in the chart RTE-1 of the 1992 TRP, and the numbers for 1992 should match the data filed in chart RTE-1 of the 1993 TRP.

[27] *See* Bell South Comments at 1 and NYNEX Comments at 1-2.

[28] The procedure adopted for displaying reversal of the previous annual access year's sharing or low end adjustment is described under Chart EXG-1.

[29] *See* Bell South Comments at 1-2 and NYNEX Comments at 1-2 discussing reversal of sharing and low end adjustment. Both companies mentioned the possibility of displaying reversal in Chart EXG-1.

[30] Because "R", the variable in the PCI formula that equals base period demand multiplied by rates, has changed since the 1992 annual access filings, the amount displayed for the removal of the sharing or low end adjustment will not match the original sharing or low end adjustment reported in the 1992 TRP. The amount of the removal should differ from the original sharing or low end adjustment by the same percentage as "R" differs between the 1992 and 1993 annual access filings.

[31] Companies should fully describe the derivation of any adjustment to the Form 492 rate of return in separate workpapers.

[32] Rather, the data are provided for the main rate elements, and at an aggregated level for other rate elements.

[33] Several other suggested modifications were not adopted. AT&T proposed an additional column showing the difference between revenue at current rates and revenue at proposed rates for each rate element. *See* AT&T Comments at 1. We believe this column is unnecessary, because the data it would summarize can be readily calculated from data already on the chart

1 under Carrier Common Line rates.[34] Second, a row for the new 800 Services category is included on Page 2 within the Traffic Sensitive Basket. Third, pages and rows for subindexes for DS1 and DS3 zone rates are included. These modifications result in some rates having different page and row numbers than the 1992 version of Chart RTE-1.

30. Chart RTE-1 includes Open Network Architecture (ONA) rates. These rates are factored into the API in Basket 2 and the SBI in Local Switching. Three rows report the three Basic Service Arrangement (BSA) rate elements and one row reports an aggregate figure for all the Basic Service Elements (BSE) elements. These rows should be populated with data for any historical ONA demand in calendar year 1992. There are four additional rows, one each for the three BSAs and one for the BSE elements, that shall be populated with recast historical feature group demand.

31. In the *Part 69/ONA Order* the Commission ordered LECs to eliminate their bundled feature groups at the time of the annual access filing in which the unbundled BSA and BSE rate elements are placed under price cap regulation, and required that carriers include as base period demand for the BSAs and BSEs both the historical demand for these two rate categories and the demand for the bundled feature groups, recast into BSAs and BSEs.[35] Ameritech has requested that LECs be permitted to use recast feature group demand in lieu of historical demand to compute the figure for current rates multiplied by demand displayed in RTE-1.[36] Ameritech maintains that reporting these data using historical demand may result in a change to the Local Switching SBI and the Traffic Sensitive SBI even if all rates are held constant.[37] These indexes, Ameritech states, were designed to change only when rates change and not when demand changes. Further, Ameritech maintains that using historical demand would effectively mean that Ameritech's revenue neutrality of restructured rates would be shown in more than the first year of price cap treatment.

32. LECs are required by the *Part 69/ONA Order* to set their ONA rates to achieve revenue neutrality at the time ONA rates are incorporated in the PCIs.[38] All LECs except Ameritech are incorporating ONA rates in their indexes for the first time in 1993 annual access filings. Therefore, in compliance with the *Part 69/ONA Order*, in order to ensure revenue neutrality, all LECs except Ameritech must use base year demand, *i.e,* calendar 1992 demand, to compute current rates multiplied by demand.[39]

33. All LECs, including Ameritech, must display historical feature group demand, historical BSA and BSE demand, if any, and recast historical feature group demand in the appropriate rows on this chart. All LECs, including Ameritech, shall also enter rates multiplied by demand in the appropriate columns of this chart for each of these rows. In the rows which sum (1) total local switching rates multiplied by demand and (2) total traffic sensitive rates multiplied by demand, LECs shall include only the rates multiplied by demand that apply to the period. Specifically, for all LECs including Ameritech, the figure for proposed rates multiplied by demand should include the proposed ONA rates multiplied by the sum of the historical ONA demand and the recast historical feature group demand. For all LECs except Ameritech, the figure for current rates multiplied by demand should include the current ONA rates multiplied by historical ONA demand and current feature group rates multiplied by historical feature group demand, but should exclude rates multiplied by the recast historical feature group demand. Ameritech's figure for current rates multiplied by demand should reflect the current ONA rates multiplied by ONA demand plus recast feature group demand. The column which reports rates effective at the time of the last PCI update multiplied by demand shall reflect all rate elements in effect at that time.

34. In the 1992 TRP Order, we required price cap LECs to provide a chart in addition to RTE-1 which gave complete rate element detail, *i.e.,* demand, existing rates, and proposed rates, along with API, SBI, and subindex computations, for every rate element. LECs provided this chart in computerized format. This rate element level of detail proved helpful in our review of the filings in certain cases in which the companies' indexes did not exactly match the indexes which could be computed from aggregate data. Therefore, we require LECs to file this chart again this year in computerized format.

35. We leave unspecified the exact format for these charts because each price cap LEC has a different number of rate elements. For each rate element, however, LECs shall display the rate element name, an identifying code, if desired, base period demand, current rates, and proposed rates. The different number of rate elements which the LECs use prevents us from specifying the row numbers, but each row of this chart should report only one rate element. The rows should reflect the same basket and service category sequence which is used in chart RTE-1. We also require the companies to display separately on this chart their feature group demand, their historical BSA and BSE demand, and their feature group demand recast into BSAs and BSEs. As AT&T noted, this will enable us to evaluate the reasonableness of recasts of feature group demand.

36. In addition to the requirements specified above, price cap carriers must include with their support materials a list of all currently applicable Part 69 waivers that permit them to file rate elements different from those specified in Part

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and are already available in more aggregate form on Chart Sum-1. AT&T also suggested the addition of a separate RTE form for ONA elements which would include, among other columns, the relationship between the ONA element and the feature groups. *See* AT&T Comments at 2-3. The full rate detail worksheets required, *infra,* will provide the information AT&T requests.

[34] This row will be used to report, among others, gross income tax surcharges.

[35] *See Part 69/ONA Order,* 6 FCC Rcd 4524, 4532 at para. 48 & n.84.

[36] *See* Ameritech Comments.

[37] The use of base year demand, instead of recast base year demand, will produce a different result only if the individual demands for the feature group rate elements have changed from the base year in which the demand was recast at different rates, or if the company is using a different method to recast demand than used in its initial ONA filing.

[38] *See Part 69/ONA Order,* 6 FCC Rcd 4524, 4532 at para. 48 & n.84.

[39] Because Ameritech included its ONA rates in its indexes in the 1992 annual access filing, it need not demonstrate revenue neutrality using 1992 demand.

69 of the Commission's Rules. The list shall be composed of the following information: (1) a citation to the Commission or Bureau Order granting the waiver; (2) a brief description of the waiver, including whether any new rate elements were created; and (3) the basket and, if applicable, service category, of any rate elements created by the waiver. Price cap carriers must also include with their support materials a separate list of new services that are being incorporated into the APIs for the first time. This list should contain all services which were introduced as new services under the price cap rules during calendar year 1992. To assist us in verifying carrier compliance with the basket and service category structure established in the *LEC Price Cap Order*, carriers must also display, for each new service listed, the basket and service category to which the new service is assigned.

III. TIER 1 TARIFF REVIEW PLAN

37. The Tier 1 TRP requirements have evolved over time, based on the experience of the Commission and comments of interested parties. Our requirements in the TRP have been framed over time to place the smallest possible burden on the Tier 1 LECs, while allowing us to evaluate the rates filed by the carriers. These requirements are discussed in the following paragraphs. Attachment B of this Order provides the charts for the Tier 1 TRP.

38. We are significantly reducing the reporting burden on LECs this year by removing Charts COS-6 and COS-7 from the TRP. These charts provided detailed data on the LECs actual and projected costs, and the allocation of these costs to interstate rate elements pursuant to Parts 32, 36, 64, and 69 of the Commission's Rules. As USTA noted in its comments in response to the *December 16 Public Notice*, a great deal of effort is required by the companies to populate the prospective version of these charts.[40] The information in these charts was used primarily for industry-wide comparisons that were conducted prior to the inception of price cap regulation. These comparisons are not being conducted at this time. We believe that the Commission's ability to evaluate the rates will be unaffected by deleting these requirements for this year. We will re-evaluate the effect of deleting these requirements before the Tier 1 TRP in 1994 is released. The 1993 TRP also includes a slight modification to Chart RTE-3. The only other changes to the remaining charts in the Tier 1 TRP are changes to the time periods of the data to be supplied.

A. Cost Charts (COS)

39. The data required by these charts have proved valuable in our analysis of the rates filed by rate of return carriers in recent annual access tariff filings. Provision of these data allowed us to avoid burdensome and time-consuming investigations that were designated in order to obtain this cost support material necessary to justify rates in earlier annual access tariff filings.

40. The historical data required by the April 2, 1993, ARMIS filings in Chart 43-01 reflect the same time period (calendar year 1992) as that adopted in this Order for use as the PYCOS period for the 1993 annual access tariff filings. Since these data provide adequate historical financial information concerning the LECs' operations during the PYCOS period, in order to reduce the LECs' reporting burdens, we will use information that the LECs provide in compliance with the April 2, 1993, ARMIS filing requirement for Chart 43-01 and Chart COS-1(H). Further, we adopt the format of ARMIS Chart 43-01 for the provision of detailed prospective (test year) cost data in Charts COS-1(P).

41. A chart by chart summary description of the TRP charts is as follows:

(1) Chart COS-1: This chart is a prospective version of ARMIS Report 43-01. Historical data in the same format are provided by ARMIS Report 43-01.

(2) Chart COS-2: This chart provides total company and interstate time series cost data. In order to obtain actual and forecast data in which inside wire and settlements expenses are treated consistently, companies are required to file data that exclude these expenses for both historical and prospective time periods. Companies should exclude all expenses, both regulated and non-regulated, associated with inside wire, including maintenance, depreciation, and amortization. Companies should also exclude those settlement expenses which are access expenses (Account 6540) paid to another company.

(3) Chart COS-3: This chart displays the impacts of major rule changes and other changes. We have updated various items for which estimates of cost impacts are required.

(4) Chart COS-4: This chart is the "report card" for the 1990, 1991, and 1992 test years. Forecast and actual cost data for the 1990 and 1991 test years are required. The forecast and actual data for the 1989 test year reported on this chart in last year's TRP are deleted, and the forecasts for July 1, 1992 through June 30, 1993, (the 1992 test year), and for July 1, 1993 through June 30, 1994 (the 1993 test year) are added. In addition, companies must report actual data for July 1, 1992 through December 31, 1992 and for calendar year 1992. The data on this chart are used to assess the accuracy of the companies' forecasts.

The forecasts reported on this chart must be those reported in previous TRPs. To form a valid basis for comparison, companies must ensure that the actual data reported for each time period on this chart include the same accounts as the forecast for that period. We will not credit "report card" data that indicates a company has grossly under-forecast its costs, because we will presume that the costs do not include the same accounts as the forecasts (contrary to the instructions for this chart), unless the company fully explains the reason for the under-forecast.

(5) Chart COS-5: This chart provides data on equal access, and is unchanged, except for updating the time periods.

B. Depreciation Chart (DEP)

(1) Chart DEP-1: This chart is unchanged from last year's version, except that the PYCOS period and test year are updated. Only those Tier 1 companies whose depreciation rates are prescribed by the Commission are required to file the DEP-1 chart. We continue to believe this chart

[40] *See* USTA Comments at 3.

is necessary even for companies not undergoing a three year review to enable us to determine if correct depreciation rates are being applied.[41]

C. Demand Charts (DMD)

(1) Chart DMD-1: This chart reports time series of common line and traffic sensitive minutes of use data. Data provided on this chart in previous annual access tariff filings are subject to revision for out-of-period adjustments for two years. In the 1992 TRP, companies reported data on this chart through December 31, 1991. Therefore, only data from January 1, 1990 forward must be provided again this year to ensure the data reflect all out-of-period adjustments.

(2) Chart DMD-2: This chart displays quarterly access line data. Chart DMD-2 is unchanged from the 1992 TRP. Data for the periods ending prior to January 1, 1991 were filed in the 1991 TRP and it is our understanding that the data are not subject to revision.

(3) Chart DMD-3: This chart is the "report card" for the 1990, 1991, and 1992 test years. Forecast and actual demand data for the 1990 and 1991 test years are required. The forecast and actual data for the 1989 test year reported on this chart in last year's TRP are deleted, and the forecast for July 1, 1992 through June 30, 1993, (the 1992 test year), and for July 1, 1993 through June 30, 1994 (the 1993 test year) are added. In addition, companies must report actual data for July 1992 through December 1992 and for calendar 1992 data. The data on this chart are used to assess the accuracy of the companies' forecasts.

(4) Chart DMD-4: Chart DMD-4 requires carriers to provide special access demand data. Historical special access demand for channel terminations, interoffice mileage, and circuits is provided on a monthly basis (end-of-period) beginning with January 1, 1990. As in the 1992 TRP, each LEC must provide a definition of services included in the Wideband category.

(5) Chart DMD-5: This chart provides detailed demand and revenue data for the common line rate elements. Data for periods prior to 1990 are not subject to revision, have been provided in previous TRPs, and need not be resubmitted this year.

D. Rate Charts (RTE)

42. The RTE charts require carriers to provide (1) rate comparisons; and (2) revenue comparisons ("price-outs") under different rate assumptions. These charts permit us to the calculate percentage changes in rates for entire rate categories. Comparisons should be made at the geographic level of aggregation at which current rates are filed, not the level of geographic aggregation at which 1993-94 rates will be filed. As described below, Chart RTE-3 includes a modification from the version in the 1992 TRP.

(1) Chart RTE-1: This chart displays end user and switched access rates. The chart is unchanged from the 1992 TRP except for the time periods for which rates are displayed.

(2) Chart RTE-2: This chart displays selected special access rates. The chart is unchanged from the 1992 TRP except for the time periods for which rates are displayed.

(3) Chart RTE-3: This chart includes a slight modification from last year's version. Chart RTE-3 displays access price comparisons, and is updated to reflect current rates, proposed rates, and rates in effect on July 1, 1992. This year we are requiring that companies use the PYCOS period (calendar year 1992) to compute comparisons instead of projected test year data.[42] Using PYCOS period demand, revenue comparisons are calculated for End User, Carrier Common Line, Switching, Local Transport, Information, Equal Access, and Special Access elements, using proposed rates and rates in effect in 1992. Nonrecurring charges should also be included in all price-outs.

E. Earnings Chart (ERN)

43. This chart displays historical and projected rates of return for each access service category at the current level of geographic aggregation.

F. Revenue Charts (REV)

44. These charts display revenues and revenue requirements. These charts are unchanged, except for updating the test year period.

(1) REV-1: This chart displays rate-making demand, rates, computed revenue, and revenue requirement for the test year. These data are provided for several rate elements within the access service categories.

(2) REV-2: This chart displays, by Part 69 access service category, recurring and non-recurring revenue. It also displays revenue from services priced on an individual case basis (ICB) basis.

G. Separations Chart (SEP)

45. This chart lists, by Part 69 elements and sub-elements, the change in the test year revenue requirement due to the introduction of new basic studies which LECs plan to implement in the test year. Basic studies are used by the LECs to develop separations factors to allocate costs between the state and interstate jurisdictions. To the extent LECs introduce these new basic studies in the prospective period, their forecast costs may not be directly comparable to their historical costs. Therefore, provision of these data in a uniform and mechanized format enables the Bureau to evaluate changes in costs between prospective and PYCOS periods. This chart is unchanged from the 1992 TRP, except for the time period reported.

H. Miscellaneous

46. We are retaining our requirements for the reporting of settlement revenue from shared facilities in the TRPs. As in the 1992 TRP, the demand and revenue requirement, on both a prospective and historical basis, must be included in the data provided by the company filing the tariff for the shared facility, and excluded from the data submitted by the company that does not file a tariff for the facility.

47. We also require Tier 1 companies to display in a workpaper in their cost support the amount of Account 6620 which is assigned to the Other Billing and Collecting expense category for the company as a whole, the interstate

[41] *See* USTA Comments at 4. USTA supports the requirement of this chart only for companies engaged in a represcription filing.

[42] AT&T points out in its comments that this change would facilitate revenue comparisons between rate of return and price cap carriers. *See* AT&T Comments at 2.

jurisdiction, and the common line rate element. These data will allow us to assess the assignment of these costs to interstate access.

IV. TIER 2 TARIFF REVIEW PLAN

48. In this section, requirements for Tier 2 companies are outlined. Chart T2RTE-2 is slightly modified from last year's version: Price comparisons in Chart T2RTE-2 should be based on PYCOS period (calendar year 1992) demand rather than test year demand.[43] The only other changes to the Tier 2 TRP are changes to the time periods reported. Requirements have been adopted with a view toward minimizing the filing burdens of smaller companies and the ability of companies to comply with the TRP data filing requirements. Attachment C of this Order provides the charts for the Tier 2 TRP.

49. As in the past, we are adopting a single TRP for both the Tier 2A and those Tier 2B companies which choose to file rates based on a prospective test year. The requirements for those Tier 2B companies which choose to use an historical test year are provided in Section I.C.2, *supra*.

50. The Tier 2 charts are updates from previous years.[44] As in the past, DMD charts for Tier 2 companies reflect billed, rather than normalized, demand.

V. GUIDELINES AND REQUIREMENTS APPLICABLE TO NECA

51. We do not detail specific summary data requirements for NECA in this Order. The level of detail required in the Tier 1 plans should provide guidance to NECA in formulating the summary data for the common line pool that it should include in its filing.

52. As in the past, we are not requiring that NECA provide Tier 1 summary data for small company estimates of costs. The level of detail required by the Tier 2 plan should provide guidance to NECA in formulating the summary data that it should include as support for these calculations. The fact that we refrain from requiring specific summary data from NECA for its rates and payment amounts does not exempt NECA from providing support data in compliance with Section 61.38 of the Commission's Rules.

53. As in previous TRPs, we require NECA to provide Chart ERN for the historical and prospective periods; settlements from its average schedule companies in Chart COS-1; and detailed cost support data concerning long term and transitional support calculations.

VI. GENERAL INSTRUCTIONS

54. The following general instructions apply to Tier 1 LECs and Tier 2 LECs, and, except as noted, to price cap LECs. Except for Section VI.C, *infra*, the following general instructions also apply to NECA. These requirements pertain to all data filed in support of access charges, including all data that are required in the TRP. All TRP data must be filed no later than April 2, 1993, and must be accurate and complete.

A. Errata

55. Carriers are under a legal obligation to correct any erroneous data discovered in the TRP or other cost support data. Nevertheless, the submission of incorrect cost support data and the subsequent filing of errata seriously detract from the ability of the Commission and interested parties to evaluate the rates within the notice period.[45] The rules require that any erratum be accompanied by a request for special permission to permit the transmittal to take effect on the originally scheduled effective date. Further, we require that if such a request is denied, rates supported by the erratum must be refiled upon adequate notice, regardless of whether these rates differ from the rates as originally filed. We believe that the special permission requirement is a reasonable means of encouraging carriers to improve the quality of data submitted in the annual access filings. We also believe it facilitates the tariff review process.

56. For the 1993 annual access tariff filing, we may specify an early cut-off date for errata. Carriers who discover errors after the cut-off will then be required to refile their tariffs with a later effective date.

B. Certification

57. NECA and the LECs must certify the accuracy of historical and test year data that are submitted in support of rates by including a signed statement that the support data are true, correct, and complete to the best of the carrier's knowledge. Certification is required for all data submitted in support of revised rates, including all data that are required by the TRP. The text of the certification is the same as that adopted in the *1987 Waiver Order*.[46] and the *1988 TRP Order*. The certification should be displayed as the last page in the binder containing each company's TRP.

C. Geographic Aggregation

58. Except for Charts RTE and ERN for rate of return carriers, all information required by the TRP must be displayed on the level of geographic aggregation to which the particular LEC's filed rates pertain. Charts RTE and ERN for rate of return carriers must be consistent with the current level of aggregation. In addition, if the tariff rates are based on data from a number of study areas or operating companies, levels of aggregation associated with each study area (state) and operating company should be provided by Tier 1 and Tier 2 carriers (except for Charts RTE, ERN, and REV). Price cap carriers need not provide TRP data below or above the level of geographic aggregation to which their proposed rates pertain.

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[43] AT&T points out in its comments that this change would facilitate price comparisons between rate of return and price cap carriers. *See* AT&T Comments at 2.

[44] Tier 2 companies which file on a prospective basis must include in their cost support the Other Billing and Collecting expense data outlined, above.

[45] *See, e.g., 1991 TRP Order* at para. 41.

[46] *See* Annual 1987 Access Tariff Filings, Petitions for Waivers of Filing Requirements, Mimeo No. 6945 (released Sept. 16, 1986) (*1987 Waiver Order*).

D. Assistance from USTA

59. In order that the Commission and interested parties may evaluate the national impact of revised rates, we request that the USTA Data Reporting Work Group provide us with aggregated data for all price cap LECs (except for those charts and portions of charts for which aggregation is inappropriate) in both hard copy and disk format.[47]

E. Waivers

60. If carriers find that they are unable to provide data required by the TRP, they may file applications for waiver. These waiver applications must demonstrate good cause for reporting a different or lower level of detail than required and must indicate how the carrier intends to comply in the future with the TRP requirements. Carriers are strongly encouraged to comply with the requirements. Omission of individual data items or entries, without request for waiver, is unacceptable. If a carrier determines, however, that it will be unable to meet these requirements, it must file an application for waiver with the Commission no later than February 25, 1993. Opposition to applications for waiver shall be filed not later than March 3, 1993. Each carrier requesting any waiver of the requirements of this Order or of any other Commission Rule or Order applicable to the 1993 annual access tariff filings shall include all such requests in this single application. Carriers should not delay undertaking development of data required by the 1993 TRP in anticipation that waiver requests will be granted.

F. Technical Requirements

61. As required in the previous TRP, all companies which file a TRP must provide the data in computerized form. For Tier 1 companies, "hard copy" printed versions of both the historical and prospective version of Chart COS-1 must be included in the TRP and should be aggregated to the tariff entity level.

G. Compliance with the Paperwork Reduction Act

62. In compliance with the Paperwork Reduction Act, we estimate burden-hours and place the Office of Management and Budget form number and date on the formats included with this Order. We also note that this TRP was developed after informal discussions with LECs and other industry representatives and after evaluation of comments filed in response to our *December 16 Public Notice*. By adoption of this Order, we are minimizing the burden on the LECs by several means. This Order deletes obsolete requirements and other requirements which have not proved useful. We note, especially, that we do not require the filing of some historical data that have been filed in previous years, and that we have significantly reduced the burden of companies by eliminating charts COS-6 and COS-7 for the Tier 1 rate of return carriers. These changes lessen the burden compared to the 1992 annual access filings. We continue to require significantly fewer data from the smaller LECs, thereby minimizing the burden of TRP data requirements for many Tier 2 companies.

VII. CONCLUSION; PROCEDURAL REQUIREMENTS

63. This Order will be sent directly to all carriers that will file their own access tariffs on April 2, 1993, and a copy will also be sent to NECA. A copy of the Order and all attachments will be available for inspection at the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. The Commission will publish the text of this Order in the FCC Record. Those parties wishing to obtain copies of Attachments A, B, and C can do so through the Commission's contractor for public records duplication.

64. Each company should submit its TRP separately from other portions of its tariff filing. Each TRP should be filed in a separate Volume 1-2 accompanying Volume 1 of the Description and Justification. Each TRP should be arranged by study area rather than by chart. Each company should provide an extra copy of the TRP to the Accounting and Audits Division, Suite 812, 2000 L Street, N.W., Washington, D.C. 20036 on or before April 2, 1993. The Commission will provide further details regarding the procedures applicable to the April 2 tariff filing in a future release.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[47] Only Charts IND-1, SUM-1, and RTE-1 need be summed. The portions of chart RTE which report rates and indexes, of course, need not be summed.

Attachment A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)
	)
Commission Requirements	)
for Cost Support Material	)
To Be Filed with 1993 Annual	)
Access Tariffs	)

Approved by OMB
3060-0400
Expires 07/31/93
See below for information regarding public
burden estimate

NOTICE: The Tariff Review Plan (TRP) contains requirements for summary cost support material that certain local exchange carriers (LECs) must file to support their annual access charge tariff filings in partial fulfillment of Sections 61.38 and 61.44 through 61.49 of the Commission's Rules. The TRPs specify basic cost and demand information in a consistent format and are essential components of the Commission's access tariff review process. The information in the TRP is used by the FCC to evaluate rates. Your response is mandatory. Public reporting burden for this collection of information is estimated to average 150 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Federal Communications Commission, Office of Managing Director, Washington, DC 20554, and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC, 20503.

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1993 Annual Access Filing
Price Cap Tariff Review Plan
Indexes

		PROPOSED PCI	PROPOSED API	PROPOSED SBI	UPPER SBI LIMIT	LOWER SBI LIMIT	EXISTING PCI	EXISTING API	EXISTING SBI	6/30/93 PCI	6/30/93 SBI
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)	(J)
	Common Line Basket										
100	Total Common Line		N/A	N/A	N/A	N/A		N/A	N/A		N/A
	Traffic Sensitive Basket										
110	Local Switching	N/A	N/A				N/A	N/A		N/A	
120	Local Transport	N/A	N/A				N/A	N/A		N/A	
130	Information	N/A	N/A				N/A	N/A		N/A	
140	800 Services	N/A	N/A				N/A	N/A		N/A	
150	Total Switched Access			N/A	N/A	N/A			N/A		N/A
	Special Access Basket										
160	Voice Grade, Wats, Metallic & Telegraph	N/A	N/A				N/A	N/A		N/A	
170	Audio & Video	N/A	N/A				N/A	N/A		N/A	
180	High Caps & DDS	N/A	N/A				N/A	N/A		N/A	
190	DS–1 SUB–CAT	N/A	N/A				N/A	N/A		N/A	
200	Density Zone 1	N/A	N/A				N/A	N/A		N/A	
210	Density Zone 2	N/A	N/A				N/A	N/A		N/A	
220	Density Zone 3	N/A	N/A				N/A	N/A		N/A	
230	DS–3 SUB–CAT	N/A	N/A				N/A	N/A		N/A	
240	Density Zone 1	N/A	N/A				N/A	N/A		N/A	
250	Density Zone 2	N/A	N/A				N/A	N/A		N/A	
260	Density Zone 3	N/A	N/A				N/A	N/A		N/A	
270	Wideband	N/A	N/A				N/A	N/A		N/A	
280	Total Special Access			N/A	N/A	N/A			N/A		N/A
	Interexchange Basket										
290	Total Interexchange			N/A	N/A	N/A			N/A		N/A

NOTES: (1) Display indexes as percents to four decimal places (e.g., display 100 as 100.0000).
(2) For the annual access filing, Column (I) will equal Column (F) and Column (J) will equal Column (H).

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Filing Entity: COSA
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1993 Annual Filing
Price Caps Tariff Review Plan
CALCULATION OF CARRIER COMMON LINE RATE CAP

		DATA
		(A)
	Step 1:	
100	Terminating CCL Premium MOU	
110	Terminating CCL Non-Premium MOU	
120	Chargeable Terminating CCL MOU	
130	Originating CCL Premium MOU	
140	Originating CCL Non-Premium MOU	
150	Chargeable Originating CCL MOU	
160	Terminating CCL Prem Capped Rates at last PCI Update	
170	Originating CCL Premium Capped Rates at last PCI Update	
180	Multiline Business EUCL Lines	
190	Res & Single Line Business EUCL Lines	
200	Lifeline Lines	
210	Special Access Surcharge Lines	
220	Multiline Business EUCL Rates at last PCI Update	
230	Res & Single Line Business EUCL Rates at last PCI Update	
240	Lifeline Rates at last PCI Update	
250	Special Access Surcharge Rates at last PCI Update	
260	CL Revenue at capped (t-1) rates	
	Step 2:	
270	CL Revenue at capped (t-1) rates	
280	CCL MOU for Base Year	
290	CL Rev/MOU (t-1)	
	Step 3:	
300	CL PCI (t)	
310	CL PCI (t-1)	
320	1 + % Change CL PCI	
330	CL Rev/MOU (t)	
	Step 4:	
340	Base Demand * Proposed SLCs	
350	CCL MOU for Base Year	
360	1+g/2	
370	SLC Rev/MOU (t)	
380	CCL Rev/MOU (t)	
	Step 5:	
390	CCL MOU for Base Year	
400	CCL Rev at CCL Rev/MOU (t)	
410	Chargeable Originating MOU	
420	Originating CCL Rev (Rate = $0.01)	
430	Residual CCL Revenue	
440	Chargeable Terminating MOU	
450	Hypothetical Premium Terminating Rate Cap #1 (Prem Orig = $0.01)	
460	Total Chargeable MOU	
470	Hypothetical Premium Terminating Rate Cap #2 (if #1 < $0.01)	
480	Premium Terminating Rate Cap	

NOTES: (1) Display indexes on rows 300 and 310 as percents to four decimal places. (e.g., display 100% as 100.0000).
(2) Display factors in rows 320 and 360 to six decimal places (e.g., display 1 as 1.000000).
(3) Display revenues, lines, and minutes as whole numbers.

PCI–1
Filing Entity: COSA
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1993 Annual Filing
Price Cap Tariff Review Plan
PCI Components

		COMMON LINE BASKET	TRAFFIC SENSITIVE BASKET	SPECIAL ACCESS BASKET	INTER–EXCHANGE BASKET
		(A)	(B)	(C)	(D)
100	GNP–PI				
110	Productivity Factor (X)				
120	GNP–PI – X				
130	Y(t–1)	N/A	N/A	N/A	
140	Delta Y	N/A	N/A	N/A	
150	Delta Z				
160	R(t–1)				
170	Delta Y/R	N/A	N/A	N/A	
180	Delta Z/R				
190	W				
200	W*(GNP–PI – X)	N/A			
210	Growth in Min./Line (G)		N/A	N/A	N/A
220	W*[GNP–PI – X – (G/2)]		N/A	N/A	N/A
	/ [1 + (G/2)]	---	---	---	---
230	Existing PCI				
240	Proposed PCI				

NOTES: (1) Display indexes and factors as percent to four decimal places (e.g., display 100% as 100.0000).
(2) Display revenues as whole numbers.
(3) Rows 130 and 160 are computed by multiplying base period quantities

SUM–1
Filing Entity: COSA
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1993 Annual Filing
Price Cap Tariff Review Plan
Price Out Summary

		BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	BASE PER DMD x CURR RATES minus BASE PER DMD x RATES AT LAST PCI UPDATE	BASE PER DMD x PROP RATES minus BASE PER DMD x CURRENT RATES
		(A)	(B)	(C)	(D) = (B) – (A)	(E) = (C) – (B)
	Common Line Basket					
100	End User Common Line					
110	Carrier Common Line					
120	Total Common Line					
	Traffic Sensitive Basket					
130	Local Switching					
140	Local Transport					
150	Information					
160	800 Services					
170	Total Switched Access					
	Special Access Basket					
180	Voice Grade, Wats, Metallic & Telegraph	---	---	---	---	---
190	Audio & Video					
200	High Caps & DDS					
210	Wideband					
220	Total Special Access					
	Interexchange Basket					
230	Total Interexchange					

Note: Display whole numbers.

EXG–1
Filing Entity: COSA
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1993 Annual Filing
Price Cap Tariff Review Plan
Exogenous Cost Changes
COMMON LINE

		SPF TRANSITION	DEM TRANSITION	LTS / TRS	INSIDE WIRE	RESERVE DEFICIENCY AMORTIZATIONS	EXCESS DEFERRED TAXES	ITC AMORTIZATIONS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)
	REVENUE EFFECT							
100	Depreciation Expense			N/A				
110	Expense less Depreciation			N/A				
120	Taxes less F.I.T.			N/A				
130	Net Return			N/A				
140	F.I.T.			N/A				
150	Uncollectible Rev. & Other Adj.	---	---	N/A ---	---	---	---	---
160	Revenue Effects							
	RATE BASE							
170	Total Plant in Service			N/A				
180	Other Rate Base Items			N/A				
190	Depreciation Reserve			N/A				
200	Accum. Deferred Inc. Tax			N/A				
210	Net Rate Base			N/A				

1951

NOTE: (1) Total may not equal sum of changes due to interactive effects.
(2) Display whole numbers.

EXG–1
Filing Entity: COSA
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1993 Annual Filing
Price Cap Tariff Review Plan
Exogenous Cost Changes
COMMON LINE

		REMOVAL OF SHARING / LOW END ADJUSTMENT	REVISION TO SHARING / LOW END ADJUSTMENT	SHARING / LOW END ADJUSTMENT	OTHER	TOTAL
		(H)	(I)	(J)	(K)	(L)
	REVENUE EFFECT					
100	Depreciation Expense	N/A	N/A	N/A		N/A
110	Expense less Depreciation	N/A	N/A	N/A		N/A
120	Taxes less F.I.T.	N/A	N/A	N/A		N/A
130	Net Return	N/A	N/A	N/A		N/A
140	F.I.T.	N/A	N/A	N/A		N/A
150	Uncollectible Rev. & Other Adj.	N/A	N/A	N/A		N/A
160	Revenue Effects					
	RATE BASE					
170	Total Plant in Service	N/A	N/A	N/A		N/A
180	Other Rate Base Items	N/A	N/A	N/A		N/A
190	Depreciation Reserve	N/A	N/A	N/A		N/A
200	Accum. Deferred Inc. Tax	N/A	N/A	N/A		N/A
210	Net Rate Base	N/A	N/A	N/A		N/A

NOTE: (1) Total may not equal sum of changes due to interactive effects.
(2) Display whole numbers.

EXG–1
Filing Entity: COSA
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1993 Annual Filing
Price Cap Tariff Review Plan
Exogenous Cost Changes
TRAFFIC SENSITIVE

		SPF TRANSITION	DEM TRANSITION	LTS / TRS	INSIDE WIRE	RESERVE DEFICIENCY AMORTIZATIONS	EXCESS DEFERRED TAXES	ITC AMORTIZATIONS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)
	REVENUE EFFECT							
300	Depreciation Expense			N/A				
310	Expense less Depreciation			N/A				
320	Taxes less F.I.T.			N/A				
330	Net Return			N/A				
340	F.I.T.			N/A				
350	Uncollectible Rev. & Other Adj.	---	---	N/A ---	---	---	---	---
360	Revenue Effects			N/A				
	RATE BASE							
370	Total Plant in Service			N/A				
380	Other Rate Base Items			N/A				
390	Depreciation Reserve			N/A				
400	Accum. Deferred Inc. Tax			N/A				
410	Net Rate Base			N/A				

1953

NOTE: (1) Total may not equal sum of changes due to interactive effects.
(2) Display whole numbers.

EXG–1
Filing Entity: COSA
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1993 Annual Filing
Price Cap Tariff Review Plan
Exogenous Cost Changes
TRAFFIC SENSITIVE

		REMOVAL OF SHARING / LOW END ADJUSTMENT	REVISION TO SHARING / LOW END ADJUSTMENT	SHARING / LOW END ADJUSTMENT	OTHER	TOTAL
		(H)	(I)	(J)	(K)	(L)
	REVENUE EFFECT					
300	Depreciation Expense	N/A	N/A	N/A		N/A
310	Expense less Depreciation	N/A	N/A	N/A		N/A
320	Taxes less F.I.T.	N/A	N/A	N/A		N/A
330	Net Return	N/A	N/A	N/A		N/A
340	F.I.T.	N/A	N/A	N/A		N/A
350	Uncollectible Rev. & Other Adj.	N/A	N/A	N/A		N/A
360	Revenue Effects					
	RATE BASE					
370	Total Plant in Service	N/A	N/A	N/A		N/A
380	Other Rate Base Items	N/A	N/A	N/A		N/A
390	Depreciation Reserve	N/A	N/A	N/A		N/A
400	Accum. Deferred Inc. Tax	N/A	N/A	N/A		N/A
410	Net Rate Base	N/A	N/A	N/A		N/A

NOTE: (1) Total may not equal sum of changes due to interactive effects.
(2) Display whole numbers.

EXG–1
Filing Entity: COSA
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1993 Annual Filing
Price Caps Tariff Review Plan
Exogenous Cost Changes
SPECIAL ACCESS

		SPF TRANSITION	DEM TRANSITION	LTS / TRS	INSIDE WIRE	RESERVE DEFICIENCY AMORTIZATIONS	EXCESS DEFERRED TAXES	ITC AMORTIZATIONS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)
	REVENUE EFFECT							
500	Depreciation Expense			N/A				
510	Expense less Depreciation			N/A				
520	Taxes less F.I.T.			N/A				
530	Net Return			N/A				
540	F.I.T.			N/A				
550	Uncollectible Rev. & Other Adj.	---	---	N/A ---	---	---	---	---
560	Revenue Effects			N/A				
	RATE BASE							
570	Total Plant in Service			N/A				
580	Other Rate Base Items			N/A				
590	Depreciation Reserve			N/A				
600	Accum. Deferred Inc. Tax			N/A				
610	Net Rate Base			N/A				

NOTE. (1) Total may not equal sum of changes due to interactive effects.
(2) Display whole numbers.

EXG–1
Filing Entity: COSA
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1993 Annual Filing
Price Cap Tariff Review Plan
Exogenous Cost Changes
SPECIAL ACCESS

		REMOVAL OF SHARING / LOW END ADJUSTMENT	REVISION TO SHARING / LOW END ADJUSTMENT	SHARING / LOW END ADJUSTMENT	OTHER	TOTAL
		(H)	(I)	(J)	(K)	(L)
	REVENUE EFFECT					
500	Depreciation Expense	N/A	N/A	N/A		N/A
510	Expense less Depreciation	N/A	N/A	N/A		N/A
520	Taxes less F.I.T.	N/A	N/A	N/A		N/A
530	Net Return	N/A	N/A	N/A		N/A
540	F.I.T.	N/A	N/A	N/A		N/A
550	Uncollectible Rev. & Other Adj.	N/A	N/A	N/A		N/A
560	Revenue Effects					
	RATE BASE					
570	Total Plant in Service	N/A	N/A	N/A		N/A
580	Other Rate Base Items	N/A	N/A	N/A		N/A
590	Depreciation Reserve	N/A	N/A	N/A		N/A
600	Accum. Deferred Inc. Tax	N/A	N/A	N/A		N/A
610	Net Rate Base	N/A	N/A	N/A		N/A

NOTE: (1) Total may not equal sum of changes due to interactive effects.
(2) Display whole numbers.

EXG–1
Filing Entity: COSA
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1993 Annual Filing
Price Cap Tariff Review Plan
Exogenous Cost Changes
INTEREXCHANGE

		SPF TRANSITION	DEM TRANSITION	LTS / TRS	INSIDE WIRE	RESERVE DEFICIENCY AMORTIZATIONS	EXCESS DEFERRED TAXES	ITC AMORTIZATIONS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)
	REVENUE EFFECT							
700	Depreciation Expense			N/A				
710	Expense less Depreciation			N/A				
720	Taxes less F.I.T.			N/A				
730	Net Return			N/A				
740	F.I.T.			N/A				
750	Uncollectible Rev. & Other Adj.	---	---	N/A ---	---	---	---	---
760	Revenue Effects			N/A				
	RATE BASE							
770	Total Plant in Service			N/A				
780	Other Rate Base Items			N/A				
790	Depreciation Reserve			N/A				
800	Accum. Deferred Inc. Tax			N/A				
810	Net Rate Base			N/A				

NOTE: (1) Total may not equal sum of changes due to interactive effects.
(2) Display whole numbers.

EXG–1
Filing Entity: COSA
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1993 Annual Filing
Price Cap Tariff Review Plan
Exogenous Cost Changes
INTEREXCHANGE

		REMOVAL OF SHARING / LOW END ADJUSTMENT	REVISION TO SHARING / LOW END ADJUSTMENT	SHARING / LOW END ADJUSTMENT	OTHER	TOTAL
		(H)	(I)	(J)	(K)	(L)
	REVENUE EFFECT					
700	Depreciation Expense	N/A	N/A	N/A		N/A
710	Expense less Depreciation	N/A	N/A	N/A		N/A
720	Taxes less F.I.T.	N/A	N/A	N/A		N/A
730	Net Return	N/A	N/A	N/A		N/A
740	F.I.T.	N/A	N/A	N/A		N/A
750	Uncollectible Rev. & Other Adj.	N/A	N/A	N/A		N/A
760	Revenue Effects	---	---	---	---	---
	RATE BASE					
770	Total Plant in Service	N/A	N/A	N/A		N/A
780	Other Rate Base Items	N/A	N/A	N/A		N/A
790	Depreciation Reserve	N/A	N/A	N/A		N/A
800	Accum. Deferred Inc. Tax	N/A	N/A	N/A		N/A
810	Net Rate Base	N/A	N/A	N/A		N/A

NOTE: (1) Total may not equal sum of changes due to interactive effects.
(2) Display whole numbers.

RTE–1
Filing Entity: COSA
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1993 Annual Filing
Price Cap Tariff Review Plan
Common Line Basket

		BASE PERIOD DEMAND	RATES AT LAST PCI UPDATE	CURRENT RATES	PROPOSED RATES	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	INDEX RESULTS
	End User Common Line								
100	Multiline Business EUCL (1)								N/A
110	Res & Single line Bus EUCL (1)								N/A
120	Lifeline								N/A
130	Special Access Surcharge								N/A
	Carrier Common Line								
140	Terminating CCL Prem.								N/A
150	Terminating CCL Non–Prem.								N/A
160	Originating CCL Prem.								N/A
170	Originating CCL Non–Prem.								N/A
180	Other Common Line (1)								N/A
190	Total Basket	N/A	N/A	N/A	N/A				N/A

NOTE: (1) May be composite rate.
(2) Display indexes as percents to four decimal places (e.g., display 100% as 100.0000).
(3) Display revenues and demands as whole numbers.

1959

RTE–1
Filing Entity: COSA
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1993 Annual Filing
Price Cap Tariff Review Plan
Traffic Sensitive Basket

		BASE PERIOD DEMAND	RATES AT LAST PCI UPDATE	CURRENT RATES	PROPOSED RATES	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
	Local Switching Service Category								
200	Premium Switching LS1 FG								N/A
210	Premium Switching LS2 FG								N/A
220	Non–Premium Switching FG								N/A
230	Premium Switching LS1 BSA								N/A
240	Premium Switching LS2 BSA								N/A
250	Non–Premium Switching BSA								N/A
260	Premium Switching LS1 FG – Recast								N/A
270	Premium Switching LS2 FG – Recast								N/A
280	Non–Premium Switching FG – Recast								N/A
290	Equal Access								N/A
300	Other ONA	N/A	N/A	N/A	N/A				N/A
310	Other ONA – Recast FG	N/A	N/A	N/A	N/A				N/A
320	Other Switching	N/A	N/A	N/A	N/A				N/A
330	Total Service Category	N/A	N/A	N/A	N/A				N/A
340	SBI	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
350	Upper SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
360	Lower SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
	Local Transport Service Category								
	Premium Local Transport:								
370	Local Trans – MB1								N/A
380	Local Trans – MB2								N/A
390	Local Trans – MB3								N/A
400	Local Trans – MB4								N/A
410	Local Trans – MB5								N/A
420	Local Trans – MB6								N/A
430	Local Trans – MB7								N/A
440	Local Trans – MB8								N/A
450	Local Trans – MB9								N/A
460	Local Trans – MB10								N/A
470	MMUC Per Line or Trunk								N/A
480	Termination								N/A
490	Facility								N/A

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Filing Entity: COSA
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1993 Annual Filing
Price Cap Tariff Review Plan
Traffic Sensitive Basket

		BASE PERIOD DEMAND	RATES AT LAST PCI UPDATE	CURRENT RATES	PROPOSED RATES	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
	Local Transport Service Category (Cont.)								
	Non–Premium Local Transport:								
500	Local Trans – MB1								N/A
510	Local Trans – MB2								N/A
520	Local Trans – MB3								N/A
530	Local Trans – MB4								N/A
540	Local Trans – MB5								N/A
550	Local Trans – MB6								N/A
560	Local Trans – MB7								N/A
570	Local Trans – MB8								N/A
580	Local Trans – MB9								N/A
590	Local Trans – MB10								N/A
600	MMUC Per Line or Trunk								N/A
610	Termination								N/A
620	Facility								N/A
630	Installation Per Ln or Trk	N/A	N/A	N/A	N/A				N/A
640	Other Transport	N/A	N/A	N/A	N/A				N/A
650	Total Service Category	N/A	N/A	N/A	N/A				N/A
660	SBI	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
670	Upper SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
680	Lower SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

RTE–1
Filing Entity: COSA
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1993 Annual Filing
Price Cap Tariff Review Plan
Traffic Sensitive Basket

		BASE PERIOD DEMAND	RATES AT LAST PCI UPDATE	CURRENT RATES	PROPOSED RATES	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
	Information Service Category								
700	Information – Per MSG.								N/A
710	Info–Premium Surcharge								N/A
720	Info–Non–Premium Surcharge								N/A
730	Information–Other	N/A	N/A	N/A	N/A				N/A
740	Total Service Category	N/A	N/A	N/A	N/A				N/A
750	SBI	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
760	Upper SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
770	Lower SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
	800 Services Category								
780	Basic 800								N/A
790	Other 800 Service	N/A	N/A	N/A	N/A				N/A
800	Total Service Category	N/A	N/A	N/A	N/A				N/A
810	SBI	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
820	Upper SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
830	Lower SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
840	Total Basket	N/A	N/A	N/A	N/A				N/A
850	Total API	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
860	Total PCI	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

1962

1993 Annual Filing
Price Cap Tariff Review Plan
Special Access Basket

	Voice Grade, Wats, Metallic, & Telegraph Service Category	BASE PERIOD DEMAND (A)	RATES AT LAST PCI UPDATE (B)	CURRENT RATES (C)	PROPOSED RATES (D)	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE (E)	BASE PERIOD DEMAND x CURRENT RATES (F)	BASE PERIOD DEMAND x PROPOSED RATES (G)	INDEX RESULTS (H)
	VOICE GRADE & WATS:								
900	Chan Term – 2 Wire								N/A
910	Chan Term – 4 Wire								N/A
	Inter–Office Mileage:								
920	Voice Grade – MB1 FIXED								N/A
930	Voice Grade – MB1 VAR								N/A
940	Voice Grade – MB2 FIXED								N/A
950	Voice Grade – MB2 VAR								N/A
960	Voice Grade – MB3 FIXED								N/A
970	Voice Grade – MB3 VAR								N/A
980	Voice Grade – MB4 FIXED								N/A
990	Voice Grade – MB4 VAR								N/A
1000	Voice Grade – MB5 FIXED								N/A
1010	Voice Grade – MB5 VAR								N/A
1020	Voice Grade – MB6 FIXED								N/A
1030	Voice Grade – MB6 VAR								N/A
1040	Voice Grade – MB7 FIXED								N/A
1050	Voice Grade – MB7 VAR								N/A
1060	Voice Grade – MB8 FIXED								N/A
1070	Voice Grade – MB8 VAR								N/A
1080	Voice Grade – MB9 FIXED								N/A
1090	Voice Grade – MB9 VAR								N/A
1100	Voice Grade – MB10 FIXED								N/A
1110	Voice Grade – MB10 VAR								N/A
1120	Other Voice Grade Fixed	N/A	N/A	N/A	N/A				N/A

RTE–1
Filing Entity: COSA
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1993 Annual Filing
Price Cap Tariff Review Plan
Special Access Basket

		BASE PERIOD DEMAND	RATES AT LAST PCI UPDATE	CURRENT RATES	PROPOSED RATES	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
	METALLIC:								
1200	Channel Term								N/A
1210	Inter–Office Mileage Fixed		N/A	N/A	N/A				N/A
1220	Inter–Office Mileage Variable		N/A	N/A	N/A				N/A
1230	Other	N/A	N/A	N/A	N/A				N/A
	TELEGRAPH:								
1240	Chan. Term–2 Wire								N/A
1250	Chan. Term–4 Wire								N/A
1260	Inter–Office Mileage Fixed		N/A	N/A	N/A				N/A
1270	Inter–Office Mileage Variable		N/A	N/A	N/A				N/A
1280	Other	N/A	N/A	N/A	N/A				N/A
1290	OTHER:	N/A	N/A	N/A	N/A				N/A
1300	Total Service Category	N/A	N/A	N/A	N/A				N/A
1310	SBI	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
1320	Upper SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
1330	Lower SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

1964

1993 Annual Filing
Price Cap Tariff Review Plan
Special Access Basket

		BASE PERIOD DEMAND	RATES AT LAST PCI UPDATE	CURRENT RATES	PROPOSED RATES	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
	Audio & Video Service Category								
	AUDIO:								
1500	Channel Term		N/A	N/A	N/A				N/A
1510	Inter–Office Mileage		N/A	N/A	N/A				N/A
1520	Other	N/A	N/A	N/A	N/A				N/A
	VIDEO:								
1530	Channel Term		N/A	N/A	N/A				N/A
1540	Inter–Office Mileage		N/A	N/A	N/A				N/A
1550	Other	N/A	N/A	N/A	N/A				N/A
1560	Total Service Category	N/A	N/A	N/A	N/A				N/A
1570	SBI	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
1580	Upper SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
1590	Lower SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

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Filing Entity: COSA
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1993 Annual Filing
Price Cap Tariff Review Plan
Special Access Basket

	High Cap & DDS Service Category	BASE PERIOD DEMAND (A)	RATES AT LAST PCI UPDATE (B)	CURRENT RATES (C)	PROPOSED RATES (D)	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE (E)	BASE PERIOD DEMAND x CURRENT RATES (F)	BASE PERIOD DEMAND x PROPOSED RATES (G)	INDEX RESULTS (H)
	DS1 SUB–CAT:								
1700	Chan Term								N/A
	Inter–Office Mileage:								
1710	DS1 – MB1								N/A
1720	DS1 – MB2								N/A
1730	DS1 – MB3								N/A
1740	DS1 – MB4								N/A
1750	DS1 – MB5								N/A
1760	DS1 – MB6								N/A
1770	DS1 – MB7								N/A
1780	DS1 – MB8								N/A
1790	DS1 – MB9								N/A
1800	DS1 – MB10								N/A
1810	Other	N/A	N/A	N/A	N/A				N/A
1820	Total Sub–Category	N/A	N/A	N/A	N/A				N/A
1830	DS1 Subindex	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
1840	Upper Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
1850	Lower Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

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1993 Annual Filing
Price Cap Tariff Review Plan
Special Access Basket

	High Cap & DDS Service Category	BASE PERIOD DEMAND (A)	RATES AT LAST PCI UPDATE (B)	CURRENT RATES (C)	PROPOSED RATES (D)	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE (E)	BASE PERIOD DEMAND x CURRENT RATES (F)	BASE PERIOD DEMAND x PROPOSED RATES (G)	INDEX RESULTS (H)
	DS1, DENSITY ZONE 1:								
2000	Chan Term								N/A
	Inter–Office Mileage:								
2010	DS1 – MB1								N/A
2020	DS1 – MB2								N/A
2030	DS1 – MB3								N/A
2040	DS1 – MB4								N/A
2050	DS1 – MB5								N/A
2060	DS1 – MB6								N/A
2070	DS1 – MB7								N/A
2080	DS1 – MB8								N/A
2090	DS1 – MB9								N/A
2100	DS1 – MB10								N/A
2110	Other	N/A	N/A	N/A	N/A				N/A
2120	Total Sub–Category	N/A	N/A	N/A	N/A				N/A
2130	Subindex	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
2140	Upper Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
2150	Lower Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

1993 Annual Filing
Price Cap Tariff Review Plan
Special Access Basket

		BASE PERIOD DEMAND	RATES AT LAST PCI UPDATE	CURRENT RATES	PROPOSED RATES	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
	High Cap & DDS Service Category								
	DS1, DENSITY ZONE 2:								
2300	Chan Term								N/A
	Inter–Office Mileage:								
2310	DS1 – MB1								N/A
2320	DS1 – MB2								N/A
2330	DS1 – MB3								N/A
2340	DS1 – MB4								N/A
2350	DS1 – MB5								N/A
2360	DS1 – MB6								N/A
2370	DS1 – MB7								N/A
2380	DS1 – MB8								N/A
2390	DS1 – MB9								N/A
2400	DS1 – MB10								N/A
2410	Other	N/A	N/A	N/A	N/A				N/A
2420	Total Sub–Category	N/A	N/A	N/A	N/A				N/A
2430	Subindex	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
2440	Upper Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
2450	Lower Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

1993 Annual Filing
Price Cap Tariff Review Plan
Special Access Basket

		BASE PERIOD DEMAND	RATES AT LAST PCI UPDATE	CURRENT RATES	PROPOSED RATES	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
	High Cap & DDS Service Category								
	DS1, DENSITY ZONE 3:								
2600	Chan Term								N/A
	Inter–Office Mileage:								
2610	DS1 – MB1								N/A
2620	DS1 – MB2								N/A
2630	DS1 – MB3								N/A
2640	DS1 – MB4								N/A
2650	DS1 – MB5								N/A
2660	DS1 – MB6								N/A
2670	DS1 – MB7								N/A
2680	DS1 – MB8								N/A
2690	DS1 – MB9								N/A
2700	DS1 – MB10								N/A
2710	Other	N/A	N/A	N/A	N/A				N/A
2720	Total Sub–Category	N/A	N/A	N/A	N/A				N/A
2730	Subindex	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
2740	Upper Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
2750	Lower Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

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1993 Annual Filing
Price Cap Tariff Review Plan
Special Access Basket

		BASE PERIOD DEMAND	RATES AT LAST PCI UPDATE	CURRENT RATES	PROPOSED RATES	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
	High Cap & DDS Service Category (Cont.)								
	DS3 SUB–CAT:								
2900	Channel Term								N/A
	Inter–Office Mileage:								
2910	DS3 – MB1								N/A
2920	DS3 – MB2								N/A
2930	DS3 – MB3								N/A
2940	DS3 – MB4								N/A
2950	DS3 – MB5								N/A
2960	DS3 – MB6								N/A
2970	DS3 – MB7								N/A
2980	DS3 – MB8								N/A
2990	DS3 – MB9								N/A
3000	DS3 – MB10								N/A
3010	Other	N/A	N/A	N/A	N/A				N/A
3020	Total Sub–Category	N/A	N/A	N/A	N/A				N/A
3030	DS3 Subindex	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
3040	Upper Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
3050	Lower Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

1993 Annual Filing
Price Cap Tariff Review Plan
Special Access Basket

		BASE PERIOD DEMAND	RATES AT LAST PCI UPDATE	CURRENT RATES	PROPOSED RATES	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
	High Cap & DDS Service Category								
	DS3, DENSITY ZONE 1:								
3200	Chan Term								N/A
	Inter–Office Mileage:								
3210	DS3 – MB1								N/A
3220	DS3 – MB2								N/A
3230	DS3 – MB3								N/A
3240	DS3 – MB4								N/A
3250	DS3 – MB5								N/A
3260	DS3 – MB6								N/A
3270	DS3 – MB7								N/A
3280	DS3 – MB8								N/A
3290	DS3 – MB9								N/A
3300	DS3 – MB10								N/A
3310	Other	N/A	N/A	N/A	N/A				N/A
3320	Total Sub–Category	N/A	N/A	N/A	N/A				N/A
3330	Subindex	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
3340	Upper Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
3350	Lower Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

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1993 Annual Filing
Price Cap Tariff Review Plan
Special Access Basket

	High Cap & DDS Service Category	BASE PERIOD DEMAND (A)	RATES AT LAST PCI UPDATE (B)	CURRENT RATES (C)	PROPOSED RATES (D)	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE (E)	BASE PERIOD DEMAND x CURRENT RATES (F)	BASE PERIOD DEMAND x PROPOSED RATES (G)	INDEX RESULTS (H)
	DS3, DENSITY ZONE 2:								
3500	Chan Term								N/A
	Inter–Office Mileage:								
3510	DS3 – MB1								N/A
3520	DS3 – MB2								N/A
3530	DS3 – MB3								N/A
3540	DS3 – MB4								N/A
3550	DS3 – MB5								N/A
3560	DS3 – MB6								N/A
3570	DS3 – MB7								N/A
3580	DS3 – MB8								N/A
3590	DS3 – MB9								N/A
3600	DS3 – MB10								N/A
3610	Other	N/A	N/A	N/A	N/A				N/A
3620	Total Sub–Category	N/A	N/A	N/A	N/A				N/A
3630	Subindex	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
3640	Upper Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
3650	Lower Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

1993 Annual Filing
Price Cap Tariff Review Plan
Special Access Basket

		BASE PERIOD DEMAND	RATES AT LAST PCI UPDATE	CURRENT RATES	PROPOSED RATES	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
	High Cap & DDS Service Category								
	DS3, DENSITY ZONE 3:								
3800	Chan Term								N/A
	Inter–Office Mileage:								
3810	DS3 – MB1								N/A
3820	DS3 – MB2								N/A
3830	DS3 – MB3								N/A
3840	DS3 – MB4								N/A
3850	DS3 – MB5								N/A
3860	DS3 – MB6								N/A
3870	DS3 – MB7								N/A
3880	DS3 – MB8								N/A
3890	DS3 – MB9								N/A
3900	DS3 – MB10								N/A
3910	Other	N/A	N/A	N/A	N/A				N/A
3920	Total Sub–Category	N/A	N/A	N/A	N/A				N/A
3930	Subindex	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
3940	Upper Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
3950	Lower Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

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1993 Annual Filing
Price Cap Tariff Review Plan
Special Access Basket

	High Cap & DDS Service Category	BASE PERIOD DEMAND (A)	RATES AT LAST PCI UPDATE (B)	CURRENT RATES (C)	PROPOSED RATES (D)	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE (E)	BASE PERIOD DEMAND x CURRENT RATES (F)	BASE PERIOD DEMAND x PROPOSED RATES (G)	INDEX RESULTS (H)
	DDS:								
4100	Channel Term		N/A	N/A	N/A				N/A
4110	Inter–Office Mileage		N/A	N/A	N/A				N/A
4120	Other	N/A	N/A	N/A	N/A				N/A
4130	OTHER HIGH–CAP & DDS	N/A	N/A	N/A	N/A				N/A
4140	Total Service Category	N/A	N/A	N/A	N/A				N/A
4150	SBI	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
4160	Upper SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
4170	Lower SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

1993 Annual Filing
Price Cap Tariff Review Plan
Special Access Basket

	Wideband Service Category	BASE PERIOD DEMAND	RATES AT LAST PCI UPDATE	CURRENT RATES	PROPOSED RATES	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
	DATA:								
4300	Channel Term		N/A	N/A	N/A				N/A
4310	Inter–Office Mileage		N/A	N/A	N/A				N/A
4320	Other	N/A	N/A	N/A	N/A				N/A
	ANALOG:								
4330	Channel Term		N/A	N/A	N/A				N/A
4340	Inter–Office Mileage		N/A	N/A	N/A				N/A
4350	Other	N/A	N/A	N/A	N/A				N/A
4360	Other Wideband	N/A	N/A	N/A	N/A				N/A
4370	Total Service Category	N/A	N/A	N/A	N/A				N/A
4380	SBI	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
4390	Upper SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
4400	Lower SBI Limit	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
4410	Total Basket	N/A	N/A	N/A	N/A				N/A
4420	Total API	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
4430	Total PCI	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

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1993 Annual Filing
Price Cap Tariff Review Plan
Interexchange Basket

		BASE PERIOD DEMAND	RATES AT LAST PCI UPDATE	CURRENT RATES	PROPOSED RATES	BASE PERIOD DEMAND x RATES AT LAST PCI UPDATE	BASE PERIOD DEMAND x CURRENT RATES	BASE PERIOD DEMAND x PROPOSED RATES	INDEX RESULTS
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
	Interexchange								
4600	Total Basket	N/A	N/A	N/A	N/A				N/A
4610	Total API	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
4620	Total PCI	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

Attachment B

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)
	)
Commission Requirements	)
for Cost Support Material	)
To Be Filed with 1993 Annual	)
Access Tariffs	)

Approved by OMB
3060-0400
Expires 07/31/93
See below for information regarding public burden estimate

NOTICE: The Tariff Review Plan (TRP) contains requirements for summary cost support material that certain local exchange carriers (LECs) must file to support their annual access charge tariff filings in partial fulfillment of Sections 61.38 and 61.44 through 61.49 of the Commission's Rules. The TRPs specify basic cost and demand information in a consistent format and are essential components of the Commission's access tariff review process. The information in the TRP is used by the FCC to evaluate rates. Your response is mandatory. Public reporting burden for this collection of information is estimated to average 150 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Federal Communications Commission, Office of Managing Director, Washington, DC 20554, and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC, 20503.

FCC REPORT 43-01 July 1990
ARMIS QUARTERLY REPORT

Approved by OMB Rev.
3060-0512
Expires 08/31/95

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxx VERSION
STUDY AREA: xxxxxxxxxxxxxxxxxxx SUBMISSION x
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COSA: xxxx PAGE 1.1 of 3.7

TABLE I - COST AND REVENUE TABLE
(Dollars in Thousands)

Row	Classification (a)	Total (b)	Nonreg (c)	SNFA and Intra-co Adjustments (d)
	Revenues			
1010	Basic Local Service	N/A	N/A	N/A
1020	Network Access Services	N/A	N/A	N/A
1030	Toll Network Services	N/A	N/A	N/A
1040	Miscellaneous	N/A	N/A	N/A
1050	Settlements	N/A	N/A	N/A
1060	Uncollectibles	N/A	N/A	N/A
1090	Net Revenues	N/A	N/A	N/A
	Expenses			
1110	Equal Access Expenses	N/A	N/A	N/A
1120	Plant Specific			
1130	Plant Non-Specific			
1140	Customer Operations Marketing			
1150	Customer Operations Services			
1160	Corporate Operations			
1170	Access		N/A	
1180	Depreciation/Amortization			
1185	FCC Expense Adjustment	N/A	N/A	N/A
1190	Total Operating Expenses			
	Other Operating Items			
1290	Other Operating Income/Losses			
	Non-operating Items			
1320	Inc Effect/Jurisdiction Differenc		N/A	N/A
1330	Extraordinary Items			
1340	AFUDC			
1350	Special Charges			
1360	All Other Non-operating Items			
1370	FCC Non-operating Adjustment	N/A	N/A	N/A
1390	Total Non-operating Items			

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COSA: xxxx

xxxxxxxxxxxx VERSION
SUBMISSION x
TABLE I
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TABLE I - COST AND REVENUE TABLE
(Dollars in Thousands)

Row	Classification (a)	All Other Adjustments (e)	Subject to Separations (f)	State (g)
	Revenues			
1010	Basic Local Service	N/A	N/A	N/A
1020	Network Access Services	N/A	N/A	N/A
1030	Toll Network Services	N/A	N/A	N/A
1040	Miscellaneous	N/A	N/A	N/A
1050	Settlements	N/A	N/A	N/A
1060	Uncollectibles	N/A	N/A	N/A
1090	Net Revenues	N/A	N/A	N/A
	Expenses			
1110	Equal Access Expenses	N/A		
1120	Plant Specific			
1130	Plant Non-Specific			
1140	Customer Operations Marketing			
1150	Customer Operations Services			
1160	Corporate Operations			
1170	Access			
1180	Depreciation/Amortization			
1185	FCC Expense Adjustment	N/A	N/A	N/A
1190	Total Operating Expenses			
	Other Operating Items			
1290	Other Operating Income/Losses			
	Non-operating Items			
1320	Inc Effect/Jurisdiction Differenc			
1330	Extraordinary Items			
1340	AFUDC			
1350	Special Charges			
1360	All Other Non-operating Items			
1370	FCC Non-operating Adjustment	N/A	N/A	N/A
1390	Total Non-operating Items			

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COSA: xxxx PAGE 1.3 OF 3.7

TABLE I - COST AND REVENUE TABLE
(Dollars in Thousands)

Row	Classification (a)	Interstate (h)	Common Line Pay (i)	Common Line Inside Wire (j)
	Revenues			
1010	Basic Local Service	N/A	N/A	N/A
1020	Network Access Services	N/A	N/A	N/A
1030	Toll Network Services	N/A	N/A	N/A
1040	Miscellaneous	N/A	N/A	N/A
1050	Settlements	N/A	N/A	N/A
1060	Uncollectibles	N/A	N/A	N/A
1090	Net Revenues	N/A	N/A	N/A
	Expenses			
1110	Equal Access Expense		N/A	N/A
1120	Plant Specific			
1130	Plant Non-Specific			
1140	Customer Operations Marketing			
1150	Customer Operations Services			
1160	Corporate Operations			
1170	Access			
1180	Depreciation/Amortization			
1185	FCC Expense Adjustment			
1190	Total Operating Expenses			
	Other Operating Items			
1290	Other Operating Income/Losses			
	Non-operating Items			
1320	Inc Effect/Jurisdiction Differenc	N/A	N/A	N/A
1330	Extraordinary Items			
1340	AFUDC			
1350	Special Charges			
1360	All Other Non-operating Items			
1370	FCC Non-operating Adjustment			
1390	Total Non-operating Items			

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PERIOD: From mmm yyyy to mmm yyyy TABLE I
COSA: xxxx PAGE 1.4 OF 3.7

TABLE I - COST AND REVENUE TABLE
(Dollars in Thousands)

Row	Classification (a)	Common Line BFP (k)	Common Line Total (m)
	Revenues		
1010	Basic Local Service	N/A	N/A
1020	Network Access Services	N/A	
1030	Toll Network Services	N/A	
1040	Miscellaneous	N/A	
1050	Settlements	N/A	
1060	Uncollectibles	N/A	
1090	Net Revenues	N/A	
	Expenses		
1110	Equal Access Expenses	N/A	N/A
1120	Plant Specific		
1130	Plant Non-Specific		
1140	Customer Operations Marketing		
1150	Customer Operations Services		
1160	Corporate Operations		
1170	Access		
1180	Depreciation/Amortization		
1185	FCC Expense Adjustment		
1190	Total Operating Expenses		
	Other Operating Items		
1290	Other Operating Income/Losses		
	Non-operating Items		
1320	Inc Effect/Jurisdiction Differenc	N/A	N/A
1330	Extraordinary Items		
1340	AFUDC		
1350	Special Charges		
1360	AllOther Non-operatingItems		
1370	FCC Non-operating Adjustment		
1390	TotalNon-operating Items		

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STUDY AREA: xxxxxxxxxxxxxxxxxxx SUBMISSION x
PERIOD: From mmm yyyy to mmm yyyy TABLE I
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TABLE I - COST AND REVENUE TABLE
(Dollars in Thousands)

Row	Classification (a)	Traffic Sensitive Switching (n)	EqualAccess (o)	Transport (p)
	Revenues			
1010	Basic Local Service	N/A	N/A	N/A
1020	Network Access Services			
1030	Toll Network Services			
1040	Miscellaneous		N/A	
1050	Settlements			
1060	Uncollectibles			
1090	Net Revenues			
	Expenses			
1110	Equal Access Expenses			
1120	Plant Specific			
1130	Plant Non-Specific			
1140	Customer Operations Marketing			
1150	Customer Operations Services			
1160	Corporate Operations			
1170	Access			
1180	Depreciation/Amortization			
1185	FCC Expense Adjustment			
1190	Total Operating Expenses			
	Other Operating Items			
1290	Other Operating Income/Losses		N/A	
	Non-operating Items			
1320	Inc Effect/Jurisdiction Differenc	N/A	N/A	N/A
1330	Extraordinary Items		N/A	
1340	AFUDC		N/A	
1350	Special Charges		N/A	
1360	All Other Non-operating Items		N/A	
1370	FCC Non-operating Adjustment		N/A	
1390	Total Non-operating Items		N/A	

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TABLE I - COST AND REVENUE TABLE
(Dollars in Thousands)

Row	Classification (a)	Traffic Sensitive Information (q)	Traffic Sensitive Total (r)	Special Access (s)
	Revenues			
1010	Basic Local Service	N/A	N/A	
1020	Network Access Services			
1030	Toll Network Services			
1040	Miscellaneous			
1050	Settlements			
1060	Uncollectibles			
1090	Net Revenues			
	Expenses			
1110	Equal Access Expenses	N/A		N/A
1120	Plant Specific			
1130	Plant Non-Specific			
1140	Customer Operations Marketing			
1150	Customer Operations Services			
1160	Corporate Operations			
1170	Access			
1180	Depreciation/Amortization			
1185	FCC Expense Adjustment			
1190	Total Operating Expenses			
	Other Operating Items			
1290	Other Operating Income/Losses			
	Non-operating Items			
1320	Inc Effect/Jurisdiction Differenc	N/A	N/A	N/A
1330	Extraordinary Items			
1340	AFUDC			
1350	Special Charges			
1360	All Other Non-operating Items			
1370	FCC Non-operating Adjustment			
1390	Total Non-operating Items			

1984

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TABLE I - COST AND REVENUE TABLE
(Dollars in Thousands)

Row	Classification (a)	Total Access (t)	Billing & Collection (u)	IX (v)
	Revenues			
1010	Basic Local Service		N/A	N/A
1020	Network Access Services		N/A	N/A
1030	Toll Network Services		N/A	N/A
1040	Miscellaneous		N/A	N/A
1050	Settlements		N/A	N/A
1060	Uncollectibles		N/A	N/A
1090	Net Revenues		N/A	N/A
	Expenses			
1110	Equal Access Expenses		N/A	N/A
1120	Plant Specific			
1130	Plant Non-Specific			
1140	Customer Operations Marketing		N/A	
1150	Customer Operations Services			
1160	Corporate Operations			
1170	Access		N/A	
1180	Depreciation/Amortization			
1185	FCC Expense Adjustment			
1190	Total Operating Expenses			
	Other Operating Items			
1290	Other Operating Income/Losses			
	Non-operating Items			
1320	Inc Effect/Jurisdiction Differenc	N/A	N/A	N/A
1330	Extraordinary Items			
1340	AFUDC			
1350	Special Charges			
1360	All Other Non-operating Items			
1370	FCC Non-operating Adjustment			
1390	Total Non-operating Items			

1985

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TABLE I - COST AND REVENUE TABLE
(Dollars in Thousands)

Row	Classification (a)	Total (b)	Nonreg (c)	SNFA and Intra-co Adjustments (d)
	Other Taxes			
1410	State and Local Income	N/A	N/A	N/A
1420	Other State and Local			
1490	Total Other Taxes	N/A	N/A	N/A
	Federal Income Taxes			
1510	Fixed Charges			
1520	IRS Income Adjustment		N/A	
1530	FCC Taxable Income Adjustment	N/A	N/A	N/A
1540	ITC Amortization			
1550	FCC ITC Adjustment	N/A	N/A	N/A
1590	Federal Income Taxes	N/A	N/A	N/A
	Plant-in-Service			
1610	Equal Access Investment	N/A	N/A	N/A
1620	Support Plant			
1630	Operator Systems Equipment			
1640	COE-Switching			
1650	COE-Transmission			
1660	Cable and Wire Facilities			
1670	IOT Equipment			
1680	Amortizable Assets			
1690	Total Plant			

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TABLE I - COST AND REVENUE TABLE
(Dollars in Thousands)

Row	Classification (a)	All Other Adjustments (e)	Subject to Separations (f)	State (g)
	Other Taxes			
1410	State and Local Income	N/A	N/A	N/A
1420	Other State and Local			
1490	Total Other Taxes	N/A	N/A	N/A
	Federal Income Taxes			
1510	Fixed Charges			
1520	IRS Income Adjustment			
1530	FCC Taxable Income Adjustment	N/A	N/A	N/A
1540	ITC Amortization			
1550	FCC ITC Adjustment	N/A	N/A	N/A
1590	Federal Income Taxes	N/A	N/A	N/A
	Plant-in-Service			
1610	Equal Access Investment	N/A		
1620	Support Plant			
1630	Operator Systems Equipment			
1640	COE-Switching			
1650	COE-Transmission			
1660	Cable and Wire Facilities			
1670	IOT Equipment			
1680	Amortizable Assets			
1690	Total Plant			

1987

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TABLE I - COST AND REVENUE TABLE
(Dollars in Thousands)

Row	Classification (a)	Interstate (h)	Common Line Pay (i)	Common Line Inside Wire (j)
	Other Taxes			
1410	State and Local Income	N/A	N/A	N/A
1420	Other State and Local		N/A	N/A
1490	Total Other Taxes	N/A	N/A	N/A
	Federal Income Taxes			
1510	Fixed Charges			
1520	IRS Income Adjustment			
1530	FCC Taxable Income Adjustment			
1540	ITC Amortization			
1550	FCC ITC Adjustment			
1590	Federal Income Taxes	N/A	N/A	N/A
	Plant-in-Service			
1610	Equal Access Investment		N/A	N/A
1620	Support Plant			
1630	Operator Systems Equipment		N/A	N/A
1640	COE-Switching		N/A	N/A
1650	COE-Transmission			N/A
1660	Cable and Wire Facilities			N/A
1670	IOT Equipment			
1680	Amortizable Assets			
1690	Total Plant			

1988

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TABLE I - COST AND REVENUE TABLE
(Dollars in Thousands)

Row	Classification (a)	Common Line BFP (k)	Common Line Total (m)
	Other Taxes		
1410	State and Local Income	N/A	
1420	Other State and Local	N/A	
1490	Total Other Taxes	N/A	
	Federal Income Taxes		
1510	Fixed Charges		
1520	IRS Income Adjustment		
1530	FCC Taxable Income Adjustment		
1540	ITC Amortization		
1550	FCC ITC Adjustment		
1590	Federal Income Taxes	N/A	
	Plant-in-Service		
1610	Equal Access Investment	N/A	N/A
1620	Support Plant		
1630	Operator Systems Equipment	N/A	N/A
1640	COE-Switching	N/A	N/A
1650	COE-Transmission		
1660	Cable and Wire Facilities		
1670	IOT Equipment		
1680	Amortizable Assets		
1690	Total Plant		

1989

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TABLE I - COST AND REVENUE TABLE
(Dollars in Thousands)

Row	Classification (a)	Traffic Sensitive Switching (n)	EqualAccess (o)	Transport (p)
	Other Taxes			
1410	State and Local Income			
1420	Other State and Local			
1490	Total Other Taxes			
	Federal Income Taxes			
1510	Fixed Charges			
1520	IRS Income Adjustment			
1530	FCC Taxable Income Adjustment			
1540	ITC Amortization			
1550	FCC ITC Adjustment			
1590	Federal Income Taxes			
	Plant-in-Service			
1610	Equal Access Investment			
1620	Support Plant			
1630	Operator Systems Equipment			
1640	COE-Switching			
1650	COE-Transmission	N/A		
1660	Cable and Wire Facilities	N/A		
1670	IOT Equipment	N/A		N/A
1680	Amortizable Assets			
1690	Total Plant			

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COSA: xxxx

TABLE I - COST AND REVENUE TABLE
(Dollars in Thousands)

Row	Classification (a)	Traffic Sensitive Information (q)	Traffic Sensitive Total (r)	Special Access (s)
	Other Taxes			
1410	State and Local Income			
1420	Other State and Local			
1490	Total Other Taxes			
	Federal Income Taxes			
1510	Fixed Charges			
1520	IRS Income Adjustment			
1530	FCC Taxable Income Adjustment			
1540	ITC Amortization			
1550	FCC ITC Adjustment			
1590	Federal Income Taxes			
	Plant-in-Service			
1610	Equal Access Investment	N/A		N/A
1620	Support Plant			
1630	Operator Systems Equipment			N/A
1640	COE-Switching	N/A		
1650	COE-Transmission	N/A		
1660	Cable and Wire Facilities	N/A		
1670	IOT Equipment	N/A	N/A	
1680	Amortizable Assets			
1690	Total Plant			

1991

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TABLE I - COST AND REVENUE TABLE
(Dollars in Thousands)

Row	Classification (a)	Total Access (t)	Billing & Collection (u)	IX (v)
	Other Taxes			
1410	State and Local Income		N/A	N/A
1420	Other State and Local			
1490	Total Other Taxes		N/A	N/A
	Federal Income Taxes			
1510	Fixed Charges			
1520	IRS Income Adjustment			
1530	FCC Taxable Income Adjustment			
1540	ITC Amortization			
1550	FCC ITC Adjustment			
1590	Federal Income Taxes		N/A	N/A
	Plant-in-Service			
1610	Equal Access Investment		N/A	N/A
1620	Support Plant			
1630	Operator Systems Equipment		N/A	
1640	COE-Switching		N/A	
1650	COE-Transmission		N/A	
1660	Cable and Wire Facilities		N/A	
1670	IOT Equipment		N/A	N/A
1680	Amortizable Assets			
1690	Total Plant			

1992

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TABLE I - COST AND REVENUE TABLE
(Dollars in Thousands)

Row	Classification (a)	Total (b)	Nonreg (c)	SNFA and Intra-co Adjustments (d)
	Other Investments			
1705	Other Jurisdictional Assets-Net		N/A	N/A
1710	Property Held for Future Use			
1720	Plant Under Construction			
1730	Plant Acquisition Adjustment		N/A	N/A
1740	Investment in Nonaffiliated Cos			
1750	Other Deferred Charges			
1760	Inventories			
1770	Cash Working Capital	N/A	N/A	N/A
1780	FCC Investment Adjustment	N/A	N/A	N/A
1790	Total Other Investments			
	Reserves			
1820	Accumulated Depreciation			
1830	Accumulated Amortization			
1840	Deferred FIT			
1850	Customer Deposits			
1870	Other Deferred Credits			
1880	Other Juris Liab & Deferr Crs-Net		N/A	N/A
1885	FCC Reserve Adjustment	N/A	N/A	N/A
1890	Total Reserves			
	Return Data			
1910	Average Net Investment	N/A	N/A	N/A
1915	Net Return	N/A	N/A	N/A
1920	Rate of Return	N/A	N/A	N/A
1925	FCC Ordered Refund	N/A	N/A	N/A
1926	Refund Adjusted for Taxes	N/A	N/A	N/A
1930	Net Return Including FCC Refund	N/A	N/A	N/A
1935	Rate of Return (including refund)	N/A	N/A	N/A
	Miscellaneous Data			
1950	Lifeline Adjustment	N/A	N/A	N/A
1960	Universal Service Fund	N/A	N/A	N/A
1970	Common Line Support-Long Term	N/A	N/A	N/A
1980	Common Line Support-Transitional	N/A	N/A	N/A

1993

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TABLE I - COST AND REVENUE TABLE
(Dollars in Thousands)

Row	Classification (a)	All Other Adjustments (e)	Subject to Separations (f)	State (g)
	Other Investments			
1705	Other Jurisdictional Assets-Net			
1710	Property Held for Future Use			
1720	Plant Under Construction			
1730	Plant Acquisition Adjustment			
1740	Investment in Nonaffiliated Cos			
1750	Other Deferred Charges			
1760	Inventories			
1770	Cash Working Capital	N/A	N/A	N/A
1780	FCC Investment Adjustment	N/A	N/A	N/A
1790	Total Other Investments			
	Reserves			
1820	Accumulated Depreciation			
1830	Accumulated Amortization			
1840	Deferred FIT			
1850	Customer Deposits			
1870	Other Deferred Credits			
1880	Other Juris Liab & Deferr Crs-Net			
1885	FCC Reserve Adjustment	N/A	N/A	N/A
1890	Total Reserves			
	Return Data			
1910	Average Net Investment	N/A		
1915	Net Return	N/A	N/A	N/A
1920	Rate of Return	N/A	N/A	N/A
1925	FCC Ordered Refund	N/A	N/A	N/A
1926	Refund Adjusted for Taxes	N/A	N/A	N/A
1930	Net Return Including FCC Refund	N/A	N/A	N/A
1935	Rate of Return (including refund)	N/A	N/A	N/A
	Miscellaneous Data			
1950	Lifeline Adjustment	N/A		
1960	Universal Service Fund	N/A		
1970	Common Line Support-Long Term	N/A	N/A	N/A
1980	Common Line Support-Transitional	N/A	N/A	N/A

1994

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TABLE I - COST AND REVENUE TABLE
(Dollars in Thousands)

Row	Classification (a)	Interstate (h)	Common Line Pay (i)	Common Line Inside Wire (j)
	Other Investments			
1705	Other Jurisdictional Assets-Net		N/A	N/A
1710	Property Held for Future Use			
1720	Plant Under Construction			
1730	Plant Acquisition Adjustment			
1740	Investment in Nonaffiliated Cos			
1750	Other Deferred Charges			
1760	Inventories			
1770	Cash Working Capital			
1780	FCC Investment Adjustment			
1790	Total Other Investments			
	Reserves			
1820	Accumulated Depreciation			
1830	Accumulated Amortization			
1840	Deferred FIT			
1850	Customer Deposits			
1870	Other Deferred Credits			
1880	Other Juris Liab & Deferr Crs-Net			
1885	FCC Reserve Adjustment			
1890	Total Reserves			
	Return Data			
1910	Average Net Investment			
1915	Net Return		N/A	N/A
1920	Rate of Return		N/A	N/A
1925	FCC Ordered Refund		N/A	N/A
1926	Refund Adjusted for Taxes		N/A	N/A
1930	Net Return Including FCC Refund		N/A	N/A
1935	Rate of Return (including refund)		N/A	N/A
	Miscellaneous Data			
1950	Lifeline Adjustment		N/A	N/A
1960	Universal Service Fund		N/A	N/A
1970	Common Line Support-Long Term		N/A	N/A
1980	Common Line Support-Transitional		N/A	N/A

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TABLE I - COST AND REVENUE TABLE
(Dollars in Thousands)

Row	Classification (a)	Common Line BFP (k)	Common Line Total (m)
	Other Investments		
1705	Other Jurisdictional Assets-Net	N/A	N/A
1710	Property Held for Future Use		
1720	Plant Under Construction		
1730	Plant Acquisition Adjustment		
1740	Investment in Nonaffiliated Cos		
1750	Other Deferred Charges		
1760	Inventories		
1770	Cash Working Capital		
1780	FCC Investment Adjustment		
1790	Total Other Investments		
	Reserves		
1820	Accumulated Depreciation		
1830	Accumulated Amortization		
1840	Deferred FIT		
1850	Customer Deposits		
1870	Other Deferred Credits		
1880	Other Juris Liab & Deferr Crs-Net		
1885	FCC Reserve Adjustment		
1890	Total Reserves		
	Return Data		
1910	Average Net Investment		
1915	Net Return	N/A	
1920	Rate of Return	N/A	
1925	FCC Ordered Refund	N/A	
1926	Refund Adjusted for Taxes	N/A	
1930	Net Return Including FCC Refund	N/A	
1935	Rate of Return (including refund)	N/A	
	Miscellaneous Data		
1950	Lifeline Adjustment	N/A	N/A
1960	Universal Service Fund	N/A	N/A
1970	Common Line Support-Long Term	N/A	
1980	Common Line Support-Transitional	N/A	

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TABLE I - COST AND REVENUE TABLE
(Dollars in Thousands)

Row	Classification (a)	Traffic Sensitive Switching (n)	EqualAccess (o)	Transport (p)
	Other Investments			
1705	Other Jurisdictional Assets-Net	N/A	N/A	N/A
1710	Property Held for Future Use			
1720	Plant Under Construction			
1730	Plant Acquisition Adjustment		N/A	
1740	Investment in Nonaffiliated Cos		N/A	
1750	Other Deferred Charges			
1760	Inventories		N/A	
1770	Cash Working Capital		N/A	
1780	FCC Investment Adjustment			
1790	Total Other Investments			
	Reserves			
1820	Accumulated Depreciation			
1830	Accumulated Amortization			
1840	Deferred FIT			
1850	Customer Deposits			
1870	Other Deferred Credits			
1880	Other Juris Liab & Deferr Crs-Net			
1885	FCC Reserve Adjustment			
1890	Total Reserves			
	Return Data			
1910	Average Net Investment			
1915	Net Return			
1920	Rate of Return			
1925	FCC Ordered Refund			
1926	Refund Adjusted for Taxes			
1930	Net Return Including FCC Refund			
1935	Rate of Return (including refund)			
	Miscellaneous Data			
1950	Lifeline Adjustment	N/A	N/A	N/A
1960	Universal Service Fund	N/A	N/A	N/A
1970	Common Line Support-Long Term	N/A	N/A	N/A
1980	Common Line Support-Transitional	N/A	N/A	N/A

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TABLE I - COST AND REVENUE TABLE
(Dollars in Thousands)

Row	Classification (a)	Traffic Sensitive Information (q)	Traffic Sensitive Total (r)	Special Access (s)
	Other Investments			
1705	Other Jurisdictional Assets-Net	N/A	N/A	N/A
1710	Property Held for Future Use			
1720	Plant Under Construction			
1730	Plant Acquisition Adjustment			
1740	Investment in Nonaffiliated Cos			
1750	Other Deferred Charges			
1760	Inventories			
1770	Cash Working Capital			
1780	FCC Investment Adjustment			
1790	Total Other Investments			
	Reserves			
1820	Accumulated Depreciation			
1830	Accumulated Amortization			
1840	Deferred FIT			
1850	Customer Deposits			
1870	Other Deferred Credits			
1880	Other Juris Liab & Deferr Crs-Net			
1885	FCC Reserve Adjustment			
1890	Total Reserves			
	Return Data			
1910	Average Net Investment			
1915	Net Return			
1920	Rate of Return			
1925	FCC Ordered Refund			
1926	Refund Adjusted for Taxes			
1930	Net Return Including FCC Refund			
1935	Rate of Return (including refund)			
	Miscellaneous Data			
1950	Lifeline Adjustment	N/A	N/A	N/A
1960	Universal Service Fund	N/A	N/A	N/A
1970	Common Line Support-Long Term	N/A	N/A	N/A
1980	Common Line Support-Transitional	N/A	N/A	N/A

1998

FCC REPORT 43-01 July 1990
ARMIS QUARTERLY REPORT

Approved by OMB Rev.
3060-0512
Expires 08/31/95

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxx VERSION
STUDY AREA: xxxxxxxxxxxxxxxxxx SUBMISSION x
PERIOD: From ■■■ yyyy to ■■■ yyyy TABLE I
COSA: xxxx PAGE 3.7 OF 3.7

TABLE I - COST AND REVENUE TABLE
(Dollars in Thousands)

Row	Classification (a)	Total Access (t)	Billing & Collection (u)	IX (v)
	Other Investments			
1705	Other Jurisdictional Assets-Net	N/A	N/A	N/A
1710	Property Held for Future Use		N/A	
1720	Plant Under Construction		N/A	
1730	Plant Acquisition Adjustment		N/A	
1740	Investment in Nonaffilated Cos			
1750	Other Deferred Charges			
1760	Inventories			
1770	Cash Working Capital			
1780	FCC Investment Adjustment			
1790	Total Other Investments			
	Reserves			
1820	Accumulated Depreciation			
1830	Accumulated Amortization			
1840	Deferred FIT			
1850	Customer Deposits			
1870	Other Deferred Credits			
1880	Other Juris Liab & Deferr Crs-Net			
1885	FCC Reserve Adjustment			
1890	Total Reserves			
	Return Data			
1910	Average Net Investment		N/A	
1915	Net Return		N/A	N/A
1920	Rate of Return		N/A	N/A
1925	FCC Ordered Refund .		N/A	N/A
1926	Refund Adjusted for Taxes		N/A	N/A
1930	Net Return Including FCC Refund		N/A	N/A
1935	Rate of Return (including refund)		N/A	N/A
	Miscellaneous Data			
1950	Lifeline Adjustment	N/A	N/A	N/A
1960	Universal Service Fund	N/A	N/A	N/A
1970	Common Line Support-Long Term		N/A	N/A
1980	Common Line Support-Transitional		N/A	N/A

1999

FILING ENTITY: ANY COMPANY

TOTAL COMPANY
(AS BOOKED)
TIME SERIES COST DATA

(DOLLARS IN THOUSANDS)

	COST DATA	1990 1Q (A)	1990 2Q (B)	1990 3Q (C)	1990 4Q (D)	1991 1Q (E)	1991 2Q (F)	1991 3Q (G)	1991 4Q (H)
	REVENUE REQUIRE.								
100	Deprec Exp								
110	Exp Less Deprec (1)								
120	Tax Less F.I.T.	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
130	Net Return	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
140	F.I.T.	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
150	Uncollect Rev & Inter During Cons & Other Rev Adj.	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
160	Revenue Requirement	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	RATE BASE								
170	Tel Plnt in Serv								
180	Rate Base Adj.								
190	Deprec Reserve								
200	Accum Deferred Income Tax								
210	Net Rate Base								

NOTE: (1) Expense Less Depreciation should exclude inside wire expenses and settlements.

2000

FILING ENTITY: ANY COMPANY

TOTAL COMPANY
(AS BOOKED)
TIME SERIES COST DATA

(DOLLARS IN THOUSANDS)

	COST DATA	1992 1Q	2Q	3Q	4Q
		(I)	(J)	(K)	(L)
	REVENUE REQUIRE.				
100	Deprec Exp				
110	Exp Less Deprec (1)				
120	Tax Less F.I.T.	N/A	N/A	N/A	N/A
130	Net Return	N/A	N/A	N/A	N/A
140	F.I.T.	N/A	N/A	N/A	N/A
150	Uncollect Rev & Inter During Cons & Other Rev Adj.	N/A	N/A	N/A	N/A
160	Revenue Requirement	N/A	N/A	N/A	N/A
	RATE BASE				
170	Tel Plnt in Serv				
180	Rate Base Adj.				
190	Deprec Reserve				
200	Accum Deferred Income Tax				
210	Net Rate Base				

NOTE: (1) Expense Less Depreciation should exclude inside wire expenses and settlements.

2001

FILING ENTITY: ANY COMPANY

TOTAL COMPANY
(AS BOOKED)
TIME SERIES COST DATA
(DOLLARS IN THOUSANDS)

	COST DATA	HISTORICAL PERIOD 1/92 - 12/92 (M)	PROSPECTIVE (TEST PER.) 7/93 - 6/94 (N)	IMPLICIT TEST PER GROWTH (O)
	REVENUE REQUIRE.			
100	Deprec Exp			
110	Exp Less Deprec (1)			
120	Tax Less F.I.T.	N/A	N/A	N/A
130	Net Return	N/A	N/A	N/A
140	F.I.T.	N/A	N/A	N/A
150	Uncollect Rev & Inter During Cons & Other Rev Adj.	N/A	N/A	N/A
160	Revenue Requirement	N/A	N/A	N/A
	RATE BASE			
170	Tel Plnt in Serv			
180	Rate Base Adj.			
190	Deprec Reserve			
200	Accum Deferred Income Tax			
210	Net Rate Base			

NOTE: (1) Expense Less Depreciation should exclude inside wire expenses and settlements.

2002

FILING ENTITY: ANY COMPANY

TOTAL COMPANY
SUBJECT TO SEPARATION
TIME SERIES COST DATA

(DOLLARS IN THOUSANDS)

	COST DATA	1990 1Q (A)	1990 2Q (B)	1990 3Q (C)	1990 4Q (D)	1991 1Q (E)	1991 2Q (F)	1991 3Q (G)	1991 4Q (H)
	REVENUE REQUIRE.								
300	Deprec Exp								
310	Exp Less Deprec (1)								
320	Tax Less F.I.T.	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
330	Net Return	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
340	F.I.T.	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
350	Uncollect Rev & Inter During Cons & Other Rev Adj.	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
360	Revenue Requirement	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	RATE BASE								
370	Tel Plnt in Serv								
380	Rate Base Adj.								
390	Deprec Reserve								
400	Accum Deferred Income Tax								
410	Net Rate Base								

NOTE: (1) Expense Less Depreciation should exclude inside wire expenses and settlements.

FILING ENTITY: ANY COMPANY

TOTAL COMPANY
SUBJECT TO SEPARATION
TIME SERIES COST DATA

(DOLLARS IN THOUSANDS)

	COST DATA	1992 1Q	2Q	3Q	4Q
		(I)	(J)	(K)	(L)
	REVENUE REQUIRE.				
300	Deprec Exp				
310	Exp Less Deprec (1)				
320	Tax Less F.I.T.	N/A	N/A	N/A	N/A
330	Net Return	N/A	N/A	N/A	N/A
340	F.I.T.	N/A	N/A	N/A	N/A
350	Uncollect Rev & Inter During Cons & Other Rev Adj.	N/A	N/A	N/A	N/A
360	Revenue Requirement	N/A	N/A	N/A	N/A
	RATE BASE				
370	Tel Plnt in Serv				
380	Rate Base Adj.				
390	Deprec Reserve				
400	Accum Deferred Income Tax				
410	Net Rate Base				

NOTE: (1) Expense Less Depreciation should exclude inside wire expenses and settlements.

2004

FILING ENTITY: ANY COMPANY

TOTAL COMPANY
SUBJECT TO SEPARATION
TIME SERIES COST DATA

(DOLLARS IN THOUSANDS)

	COST DATA	HISTORICAL PERIOD 1/92 - 12/92	PROSPECTIVE (TEST PER.) 7/93 - 6/94	IMPLICIT TEST PER GROWTH
		(M)	(N)	(O)
	REVENUE REQUIRE.			
300	Deprec Exp			
310	Exp Less Deprec (1)			
320	Tax Less F.I.T.	N/A	N/A	N/A
330	Net Return	N/A	N/A	N/A
340	F.I.T.	N/A	N/A	N/A
350	Uncollect Rev & Inter During Cons & Other Rev Adj.	N/A	N/A	N/A
360	Revenue Requirement	N/A	N/A	N/A
	RATE BASE			
370	Tel Plnt in Serv			
380	Rate Base Adj.			
390	Deprec Reserve			
400	Accum Deferred Income Tax			
410	Net Rate Base			

NOTE: (1) Expense Less Depreciation should exclude inside wire expenses and settlements.

2005

FILING ENTITY: ANY COMPANY

INTERSTATE
TIME SERIES COST DATA

(DOLLARS IN THOUSANDS)

		1990				1991			
	COST DATA	1Q	2Q	3Q	4Q	1Q	2Q	3Q	4Q
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
	REVENUE REQUIRE.								
500	Deprec Exp								
510	Exp Less Deprec (1)								
520	Tax Less F.I.T.	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
530	Net Return	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
540	F.I.T.	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
550	Uncollect Rev & Inter During Cons & Other Rev Adj.	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
560	Revenue Requirement	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	RATE BASE								
570	Tel Plnt in Serv								
580	Rate Base Adj.								
590	Deprec Reserve								
600	Accum Deferred Income Tax								
610	Net Rate Base								

NOTE: (1) Expense Less Depreciation should exclude inside wire expenses and settlements.

2006

FILING ENTITY: ANY COMPANY

INTERSTATE
TIME SERIES COST DATA
(DOLLARS IN THOUSANDS)

	COST DATA	1992 1Q	2Q	3Q	4Q
		(I)	(J)	(K)	(L)
	REVENUE REQUIRE.				
500	Deprec Exp				
510	Exp Less Deprec (1)				
520	Tax Less F.I.T.	N/A	N/A	N/A	N/A
530	Net Return	N/A	N/A	N/A	N/A
540	F.I.T.	N/A	N/A	N/A	N/A
550	Uncollect Rev & Inter During Cons & Other Rev Adj.	N/A	N/A	N/A	N/A
560	Revenue Requirement	N/A	N/A	N/A	N/A
	RATE BASE				
570	Tel Plnt in Serv				
580	Rate Base Adj.				
590	Deprec Reserve				
600	Accum Deferred Income Tax				
610	Net Rate Base				

NOTE: (1) Expense Less Depreciation should exclude inside wire expenses and settlements.

2007

FILING ENTITY: ANY COMPANY

INTERSTATE
TIME SERIES COST DATA
(DOLLARS IN THOUSANDS)

	COST DATA	HISTORICAL PERIOD 1/92 - 12/92	PROSPECTIVE (TEST PER.) 7/93 - 6/94	IMPLICIT TEST PER GROWTH
		(M)	(N)	(O)
	REVENUE REQUIRE.			
500	Deprec Exp			
510	Exp Less Deprec (1)			
520	Tax Less F.I.T.	N/A	N/A	N/A
530	Net Return	N/A	N/A	N/A
540	F.I.T.	N/A	N/A	N/A
550	Uncollect Rev & Inter During Cons & Other Rev Adj.	N/A	N/A	N/A
560	Revenue Requirement	N/A	N/A	N/A
	RATE BASE			
570	Tel Plnt in Serv			
580	Rate Base Adj.			
590	Deprec Reserve			
600	Accum Deferred Income Tax			
610	Net Rate Base			

NOTE: (1) Expense Less Depreciation should exclude inside wire expenses and settlements.

2008

FILING ENTITY: ANY COMPANY

INTERSTATE ACCESS COST DATA
EFFECT OF VARIOUS ITEMS ON
1993 TEST YEAR AMOUNTS

(Dollars in Thousands)

	COST DATA	TOTAL REGULATED IS ACCESS TEST YEAR (7/93 - 6/94)	AMORTIZATION OF EMBEDDED INSIDE WIRE	DIFFERENCE BETWEEN PYCOS AND TEST YEAR BAF	DEP. AND AMORT. RESERVE IMBALANCE CORRECTIONS	LOCAL SWITCHING ALLOCATOR TRANSITION (DEM)
		(A)	(B)	(C)	(D)	(E)
	REVENUE REQUIREMENT					
100	Depreciation Expense					
110	Expense Less Depreciation					
120	Taxes Less F.I.T.					
130	Net Return					
140	F.I.T.					
150	Uncollectible Rev., Interest During Const. & other Rev Adj.					
160	Revenue Requirement					
	RATE BASE					
170	Total Plant In Service					
180	Rate Base Adjustments					
190	Depreciation Reserve					
200	Accum. Deferred Inc. Tax					
210	Net Rate Base					

NOTE: Column (B) includes effects of annual rate base reductions due to ongoing amortizations as well as the effect of completion of amortizations. See Commission Requirements for Cost Support Material To Be Filed with January 1, 1990, Access Tariff Revisions, Memorandum Opinion and Order, DA 89-1255, released September 29, 1989.

Filing Entity: ANY COMPANY

ANALYSIS OF ACCESS ELEMENT COST DATA

(DOLLARS IN THOUSANDS)

		COMMON LINE	TRAFFIC SENSITIVE		OTHER INTERSTATE	TOTAL INTERSTATE	TOTAL COMPANY (SUBJ TO SEPAR)
			SWITCHED	SPECIAL			
		(A)	(B)	(C)	(D)	(E)	(F)
	TEST YEAR FORECAST 7/93 TO 6/94						
	REVENUE REQUIREMENT						
100	Depreciation						
105	Expense Less Depreciation						
110	Taxes Less F.I.T.				N/A	N/A	N/A
115	Net Return				N/A	N/A	N/A
120	F.I.T.				N/A	N/A	N/A
125	Uncoll. Rev., I.D.C. & Other Rev. Adj.				N/A	N/A	N/A
130	Revenue Requirement				N/A	N/A	N/A
135	Access Service Revenues				N/A	N/A	N/A
	RATE BASE						
140	Telephone Plant In Service						
145	Rate Base Adjustments						
150	Depreciation Reserve						
155	Accum. Deferred Inc. Tax						
160	Net Rate Base						
	HISTORICAL PERIOD 1/92 TO 12/92						
	REVENUE REQUIREMENT						
200	Depreciation						
205	Expense Less Depreciation						
210	Taxes Less F.I.T.						N/A
215	Net Return						N/A
220	F.I.T.						N/A
225	Uncoll. Rev., I.D.C. & Other Rev. Adj.						N/A
230	Revenue Requirement						N/A
235	Access Service Revenues				N/A	N/A	N/A
	RATE BASE						
240	Telephone Plant In Service						
245	Rate Base Adjustments						
250	Depreciation Reserve						
255	Accum. Deferred Inc. Tax						
260	Net Rate Base						

Filing Entity: ANY COMPANY

ANALYSIS OF ACCESS ELEMENT COST DATA

(DOLLARS IN THOUSANDS)

		COMMON LINE	TRAFFIC SENSITIVE		OTHER INTERSTATE	TOTAL INTERSTATE	TOTAL COMPANY (SUBJ TO SEPAR)
			SWITCHED	SPECIAL			
		(A)	(B)	(C)	(D)	(E)	(F)
	HISTORICAL PERIOD 7/92 TO 12/92 (1)						
	REVENUE REQUIREMENT						
300	Depreciation						
305	Expense Less Depreciation						
310	Taxes Less F.I.T.						N/A
315	Net Return						N/A
320	F.I.T.						N/A
325	Uncoll. Rev., I.D.C. & Other Rev. Adj.						N/A
330	Revenue Requirement						N/A
335	Access Service Revenues				N/A	N/A	N/A
	RATE BASE						
340	Telephone Plant In Service						
345	Rate Base Adjustments						
350	Depreciation Reserve						
355	Accum. Deferred Inc. Tax						
360	Net Rate Base						

Notes: (1) Actual Operating Statistics. These data should reflect the same accounts and ratemaking treatment included in the forecasts for this period.
(2) From 1991 TRP COS - 4 (3) From 1990 TRP COS - 5

Filing Entity: ANY COMPANY

ANALYSIS OF ACCESS ELEMENT COST DATA

(DOLLARS IN THOUSANDS)

		COMMON LINE	TRAFFIC SENSITIVE		OTHER INTERSTATE	TOTAL INTERSTATE	TOTAL COMPANY (SUBJ TO SEPAR)
			SWITCHED	SPECIAL			
		(A)	(B)	(C)	(D)	(E)	(F)
	HISTORICAL PERIOD 7/91 TO 6/92 (1)						
	REVENUE REQUIREMENT						
400	Depreciation						
405	Expense Less Depreciation						
410	Taxes Less F.I.T.						N/A
415	Net Return						N/A
420	F.I.T.						N/A
425	Uncoll. Rev., I.D.C. & Other Rev. Adj.						N/A
430	Revenue Requirement						N/A
435	Access Service Revenues				N/A	N/A	N/A
	RATE BASE						
440	Telephone Plant In Service						
445	Rate Base Adjustments						
450	Depreciation Reserve						
455	Accum. Deferred Inc. Tax						
460	Net Rate Base						
	TEST YEAR FORECAST 7/91 TO 6/92 (2)						
	REVENUE REQUIREMENT						
500	Depreciation						
505	Expense Less Depreciation						
510	Taxes Less F.I.T.				N/A	N/A	N/A
515	Net Return				N/A	N/A	N/A
520	F.I.T.				N/A	N/A	N/A
525	Uncoll. Rev., I.D.C. & Other Rev. Adj.				N/A	N/A	N/A
530	Revenue Requirement				N/A	N/A	N/A
535	Access Service Revenues				N/A	N/A	N/A
	RATE BASE						
540	Telephone Plant In Service						
545	Rate Base Adjustments						
550	Depreciation Reserve						
555	Accum. Deferred Inc. Tax						
560	Net Rate Base						

Notes: (1) Actual Operating Statistics. These data should reflect the same accounts and ratemaking treatment included in the forecasts for this period.
(2) From 1991 TRP COS - 4 (3) From 1990 TRP COS - 4

Filing Entity: ANY COMPANY

ANALYSIS OF ACCESS ELEMENT COST DATA

(DOLLARS IN THOUSANDS)

		COMMON LINE	TRAFFIC SENSITIVE		OTHER INTERSTATE	TOTAL INTERSTATE	TOTAL COMPANY (SUBJ TO SEPAR)
			SWITCHED	SPECIAL			
		(A)	(B)	(C)	(D)	(E)	(F)
	HISTORICAL PERIOD 7/90 TO 6/91 ANNUALIZED (1)						
	REVENUE REQUIREMENT						
600	Depreciation						
605	Expense Less Depreciation						
610	Taxes Less F.I.T.						N/A
615	Net Return						N/A
620	F.I.T.						N/A
625	Uncoll. Rev., I.D.C. & Other Rev. Adj.						N/A
630	Revenue Requirement						N/A
635	Access Service Revenues				N/A	N/A	N/A
	RATE BASE						
640	Telephone Plant In Service						
645	Rate Base Adjustments						
650	Depreciation Reserve						
655	Accum. Deferred Inc. Tax						
660	Net Rate Base						
	TEST YEAR FORECAST 7/90 TO 6/91 ANNUALIZED (3)						
	REVENUE REQUIREMENT						
700	Depreciation						
705	Expense Less Depreciation						
710	Taxes Less F.I.T.				N/A	N/A	N/A
715	Net Return				N/A	N/A	N/A
720	F.I.T.				N/A	N/A	N/A
725	Uncoll. Rev., I.D.C. & Other Rev. Adj.				N/A	N/A	N/A
730	Revenue Requirement				N/A	N/A	N/A
735	Access Service Revenues				N/A	N/A	N/A
	RATE BASE						
740	Telephone Plant In Service						
745	Rate Base Adjustments						
750	Depreciation Reserve						
755	Accum. Deferred Inc. Tax						
760	Net Rate Base						

Notes: (1) Actual Operating Statistics. These data should reflect the same accounts and ratemaking treatment included in the forecasts for this period.
(2) From 1991 TRP COS - 4 (3) From 1990 TRP COS - 4

FILING ENTITY: ANY COMPANY

EQUAL ACCESS
TOTAL COMPANY SUBJECT TO SEPARATIONS
(DOLLARS IN THOUSANDS)

		HISTORICAL 1/92 - 12/92	PROSPECTIVE TEST PERIOD 7/93 - 6/94
	REVENUES	(A)	(B)
100	Net Revenues / Rev. Req.		N/A
	EXPENSES AND TAXES		
110	Depreciation Expense		
120	Exp less Dep. - Cumulative Amort. from Prior Periods		
130	Exp less Dep. - Amort. For Current Period		
140	Tax less F.I.T.		N/A
150	F.I.T.		N/A
160	Investment Tax Credit Amort.		
170	Fixed Charges		
180	Net Return		N/A
	RATE BASE		
200	Total Plant In Service		
210	Unamort Equal Access Amount Cumulative from Prior Period		
220	Unamort Equal Access Amount For Current Period		
230	Other Rate Base Adjustments		N/A
240	Depreciation Reserve		
250	Accum. Deferred Income Tax		
260	Net Rate Base		N/A
270	Net Rate of Return	N/A	N/A
280	Booked Rate of Return	N/A	N/A

FILING ENTITY: ANY COMPANY

EQUAL ACCESS
SEPARATED INTERSTATE WITH EXPENSE AMORTIZATION
(DOLLARS IN THOUSANDS)

COS - 5
Page 2 of 2

		HISTORICAL 1/92 - 12/92		PROSPECTIVE 7/93 - 6/94	
		ECs W/SEP. EA RATE ELEMENT	ECs W/EA COSTS INCL IN LOC SWITCH RATE ELEMENT	ECs W/SEP. EA RATE ELEMENT	ECs W/EA COSTS INCL IN LOC SWITCH RATE ELEMENT
	REVENUES	(C)	(D)	(E)	(F)
300	Net Revenues/Rev. Req.				
	EXPENSES AND TAXES				
310	Depreciation Expense				
320	Exp less Dep - Cumulative Amort. from Prior Period				
330	Exp less Dep - Amortized for Current Period				
340	Tax Less F.I.T.				
350	F.I.T.				
360	Investment Tax Credit Amort				
370	Fixed Charges				
380	Net Return				
	RATE BASE				
400	Total Plant In Service				
410	Unamort Equal Access Amount Average from Prior Period				
420	Unamort Equal Access Amount Average for Current Period				
430	Other Rate Base Adjustments				
440	Depreciation Reserve				
450	Accum Deferred Income Tax				
460	Net Rate Base				
470	Net Rate of Return				
480	Booked Rate of Return				

FILING ENTITY: ANY COMPANY

TOTAL COMPANY (SUBJECT TO SEPARATIONS)
DEPRECIATION INFORMATION ANALYSIS
($000 OMITTED)

	ACCOUNT NUMBER	CLASS OR SUBCLASS OF PLANT	DEPRECIATION 1/1/92 RATES (A)	DEPRECIATION 1/1/92 RIC AMORT $ (B)	DEPRECIATION 1/1/93 (1) RATES (C)	DEPRECIATION 1/1/93 (1) RIC AMORT $ (D)	7/93 - 6/94 RATES (E)	7/93 - 6/94 RIC AMORT $ (F)
		RATE CATEGORIES						
100	2112	MOTOR VEHICLES						
110	2113	AIRCRAFT						
120	2115	GARAGE WORK EQPT.						
130	2116	OTHER WORK EQUIPMENT						
140	2121	BUILDINGS						
150	2122	FURNITURE						
160	2123	OFFICIAL COMM. EQPT.						
170		OFFICE SUPPORT EQPT.						
180		OFFICIAL COMM. EQPT.						
190	2124	GENERAL PURP. COMPUTERS						
200	2211	ANALOG ELEC. SWITCH						
210	2212	DIGITAL ELEC. SWITCH						
220	2215	ELECTRO MECHANICAL						
230	2220	OPERATOR SYSTEMS						
240	2231	RADIO SYSTEMS						
250	2232	CIRCUIT EQPT.						
260		ANALOG CIRCUIT EQPT.						
270		DIGITAL CIRCUIT EQPT.						
280		DIGITAL DATA SYSTEMS						
290	2351	PUBLIC TEL TERM EQPT						
300	2362	OTHER TERMINAL EQPT.						
310		TEL. & MISC.						
320		PBX - DDS						
330		PBX - OTHER						
340	2411	POLES						
350	2421	AERIAL CABLE						
360		AC - SUBSCRIBER						
370		AC - TRUNK						
380	2422	UNDERGROUND CABLE						
390		UG - SUBSCRIBER						
400		UG - TRUNK						
410	2423	BURIED CABLE						
420	2424	SUBMARINE CABLE						
430	2426	INTRABUILD. NETWORK CABLE						
440	2441	CONDUIT SYSTEMS						
450								
460								
470								
480								
490								
500		SUB TOTAL: TOTAL CO. DEPRECIABLE ACCOUNTS	N/A		N/A		N/A	
510		SUB TOTAL: COMPOSITE DEPR. RATE	N/A	N/A	N/A	N/A	N/A	N/A

---------- N O T E ----------
ILLUSTRATIVE RATE CATEGORIES

RATE CATEGORIES WILL BE
POPULATED WITH APPROPRIATE
COMPANY SPECIFIC INFORMATION

NOTE: (1) Currently prescribed rates

2016

FILING ENTITY: ANY COMPANY

TOTAL COMPANY (SUBJECT TO SEPARATIONS)
DEPRECIATION INFORMATION ANALYSIS
($000 OMITTED)

		DEPRECIATION					
		1/1/92		1/1/93(1)		7/93 - 6/94	
	ACCOUNT NUMBER CLASS OR SUBCLASS OF PLANT	RATES	RIC AMORT $	RATES	RIC AMORT $	RATES	RIC AMORT $
	OTHER ACCOUNTS	(A)	(B)	(C)	(D)	(E)	(F)
520	2111 LAND	N/A	N/A	N/A	N/A	N/A	N/A
530	2321 STN CON. IW AMORT.	N/A		N/A		N/A	
540	MISC E.G., OTH AMORT. ACCTS	N/A		N/A		N/A	
560	SUB TOTAL: TOTAL CO. PRIOR TO ADJUSTMENTS	N/A		N/A		N/A	
570	SUB TOTAL: COMPOSITE DEPR. RATE	N/A	N/A	N/A	N/A	N/A	N/A
	ADJUSTMENTS TO TOTAL COMPANY:						
580	PART 64	N/A	N/A	N/A	N/A	N/A	N/A
590	BOC ADJUSTMENTS (E.G., SNFA, TP)	N/A	N/A	N/A	N/A	N/A	N/A
600	ICO ADJUSTMENTS (E.G., CPE)	N/A	N/A	N/A	N/A	N/A	N/A
610	TOTAL CO. SUBJECT TO SEPARATIONS	N/A		N/A		N/A	
620	COMPOSITE DEPRECIATION RATES	N/A	N/A	N/A	N/A	N/A	N/A

NOTE: (1) Currently prescribed rates

FILING ENTITY: ANY COMPANY

TOTAL COMPANY (SUBJECT TO SEPARATIONS)
DEPRECIATION INFORMATION ANALYSIS
($000 OMITTED)

	ACCOUNT NUMBER	CLASS OR SUBCLASS OF PLANT	EFFECTIVE DATE 1/1/92 RATES (G)	1/1/92 RIC AMORT $ (H)	EFFECTIVE DATE OF 1993 RATES (I)	OF 1993 RIC AMORT $ (J)	EFFECTIVE DATE OF 1994 RATES (K)	OF 1994 RIC AMORT $ (L)
		RATE CATEGORIES						
100	2112	MOTOR VEHICLES						
110	2113	AIRCRAFT						
120	2115	GARAGE WORK EQPT.						
130	2116	OTHER WORK EQUIPMENT						
140	2121	BUILDINGS						
150	2122	FURNITURE						
160	2123	OFFICIAL COMM. EQPT.						
170		OFFICE SUPPORT EQPT.						
180		OFFICIAL COMM. EQPT.						
190	2124	GENERAL PURP. COMPUTERS						
200	2211	ANALOG ELEC. SWITCH						
210	2212	DIGITAL ELEC. SWITCH						
220	2215	ELECTRO MECHANICAL						
230	2220	OPERATOR SYSTEMS						
240	2231	RADIO SYSTEMS						
250	2232	CIRCUIT EQPT.						
260		ANALOG CIRCUIT EQPT.						
270		DIGITAL CIRCUIT EQPT.						
280		DIGITAL DATA SYSTEMS						
290	2351	PUBLIC TEL TERM EQPT						
300	2362	OTHER TERMINAL EQPT.						
310		TEL. & MISC.						
320		PBX - DDS						
330		PBX - OTHER						
340	2411	POLES						
350	2421	AERIAL CABLE						
360		AC - SUBSCRIBER						
370		AC - TRUNK						
380	2422	UNDERGROUND CABLE						
390		UG - SUBSCRIBER						
400		UG - TRUNK						
410	2423	BURIED CABLE						
420	2424	SUBMARINE CABLE						
430	2426	INTRABUILD. NETWORK CABLE						
440	2441	CONDUIT SYSTEMS						
450								
460								
470								
480								
490								
500		SUB TOTAL: TOTAL CO. DEPRECIABLE ACCOUNTS	N/A	N/A	N/A	N/A	N/A	N/A
510		SUB TOTAL: COMPOSITE DEPR. RATE	N/A	N/A	N/A	N/A	N/A	N/A

---------- N O T E ----------
ILLUSTRATIVE RATE CATEGORIES

RATE CATEGORIES WILL BE
POPULATED WITH APPROPRIATE
COMPANY SPECIFIC INFORMATION

2018

FILING ENTITY: ANY COMPANY

TOTAL COMPANY (SUBJECT TO SEPARATIONS)
DEPRECIATION INFORMATION ANALYSIS
($000 OMITTED)

		EFFECTIVE DATE 1/1/92		EFFECTIVE DATE OF 1993		EFFECTIVE DATE OF 1994	
	ACCOUNT NUMBER CLASS OR SUBCLASS OF PLANT	RATES	RIC AMORT $	RATES	RIC AMORT $	RATES	RIC AMORT $
	OTHER ACCOUNTS	(G)	(H)	(I)	(J)	(K)	(L)
520	2111 LAND	N/A	N/A	N/A	N/A	N/A	N/A
530	2321 STN CON. IW AMORT.	N/A		N/A		N/A	
540	MISC E.G., OTH AMORT. ACCTS	N/A	N/A	N/A	N/A	N/A	N/A
560	SUB TOTAL: TOTAL CO. PRIOR TO ADJUSTMENTS	N/A	N/A	N/A	N/A	N/A	N/A
570	SUB TOTAL: COMPOSITE DEPR. RATE	N/A	N/A	N/A	N/A	N/A	N/A
	ADJUSTMENTS TO TOTAL COMPANY:						
580	PART 64	N/A	N/A	N/A	N/A	N/A	N/A
590	BOC ADJUSTMENTS (E.G., SNFA, TP)	N/A	N/A	N/A	N/A	N/A	N/A
600	ICO ADJUSTMENTS (E.G., CPE)	N/A	N/A	N/A	N/A	N/A	N/A
610	TOTAL CO. SUBJECT TO SEPARATIONS	N/A	N/A	N/A	N/A	N/A	N/A
620	COMPOSITE DEPRECIATION RATES	N/A	N/A	N/A	N/A	N/A	N/A

FILING ENTITY: ANY COMPANY

TOTAL COMPANY (SUBJECT TO SEPARATIONS)
DEPRECIATION INFORMATION ANALYSIS
($000 OMITTED)

	ACCOUNT NUMBER	CLASS OR SUBCLASS OF PLANT	PLT IN SVC A/O 1/1/92	PLT IN SVC A/O 1/1/93	PLT IN SVC A/O 7/1/93	PLT IN SVC A/O 7/1/94	7/1/93 TO 6/30/94 TEST PERIOD ESTIMATED AVERAGE PLANT BALANCES	7/1/93 - 6/30/94 TEST PERIOD ESTIMATED EFFECT DUE TO DEPR EXP	AMORT $	TOTAL
	RATE CATEGORIES		(M)	(N)	(O)	(P)	(Q)	(R)	(S)	(T)=R+S
100	2112	MOTOR VEHICLES								
110	2113	AIRCRAFT								
120	2115	GARAGE WORK EQPT.								
130	2116	OTHER WORK EQUIPMENT								
140	2121	BUILDINGS								
150	2122	FURNITURE								
160	2123	OFFICIAL COMM. EQPT.								
170		OFFICE SUPPORT EQPT.								
180		OFFICIAL COMM. EQPT.								
190	2124	GENERAL PURP. COMPUTERS								
200	2211	ANALOG ELEC. SWITCH								
210	2212	DIGITAL ELEC. SWITCH								
220	2215	ELECTRO MECHANICAL								
230	2220	OPERATOR SYSTEMS								
240	2231	RADIO SYSTEMS								
250	2232	CIRCUIT EQPT.								
260		ANALOG CIRCUIT EQPT.								
270		DIGITAL CIRCUIT EQPT.								
280		DIGITAL DATA SYSTEMS								
290	2351	PUBLIC TEL TERM EQPT								
300	2362	OTHER TERMINAL EQPT.								
310		TEL. & MISC.								
320		PBX - DDS								
330		PBX - OTHER								
340	2411	POLES								
350	2421	AERIAL CABLE								
360		AC - SUBSCRIBER								
370		AC - TRUNK								
380	2422	UNDERGROUND CABLE								
390		UG - SUBSCRIBER								
400		UG - TRUNK								
410	2423	BURIED CABLE								
420	2424	SUBMARINE CABLE								
430	2426	INTRABUILD. NETWORK CABLE								
440	2441	CONDUIT SYSTEMS								
450										
460										
470										
480										
490										
500	SUB TOTAL:	TOTAL CO. DEPRECIABLE ACCOUNTS								
510	SUB TOTAL:	COMPOSITE DEPR. RATE	N/A	N/A	N/A	N/A	N/A		N/A	

--------- N O T E ----------
ILLUSTRATIVE RATE CATEGORIES

RATE CATEGORIES WILL BE
POPULATED WITH APPROPRIATE
COMPANY SPECIFIC INFORMATION

2020

FILING ENTITY: ANY COMPANY

TOTAL COMPANY (SUBJECT TO SEPARATIONS)
DEPRECIATION INFORMATION ANALYSIS
($000 OMITTED)

	ACCOUNT NUMBER CLASS OR SUBCLASS OF PLANT	PLT IN SVC A/O 1/1/92	PLT IN SVC A/O 1/1/93	PLT IN SVC A/O 7/1/93	PLT IN SVC A/O 7/1/94	7/1/93 TO 6/30/94 TEST PERIOD ESTIMATED AVERAGE PLANT BALANCES	7/1/93 - 6/30/94 TEST PERIOD ESTIMATED EFFECT DUE TO DEPR EXP	AMORT $	TOTAL
	OTHER ACCOUNTS	(M)	(N)	(O)	(P)	(Q)	(R)	(S)	(T)=R+S
520	2111 LAND						N/A	N/A	N/A
530	2321 STN CON. IW AMORT.						N/A		
540	MISC E.G., OTH AMORT. ACCTS						N/A		
560	SUB TOTAL: TOTAL CO. PRIOR TO ADJUSTMENTS								
570	SUB TOTAL: COMPOSITE DEPR. RATE	N/A	N/A	N/A	N/A	N/A	N/A	N/A	
	ADJUSTMENTS TO TOTAL COMPANY:								
580	PART 64								
590	BOC ADJUSTMENTS (E.G., SNFA, TP)								
600	ICO ADJUSTMENTS (E.G., CPE)								
610	TOTAL CO. SUBJECT TO SEPARATIONS								
620	COMPOSITE DEPRECIATION RATES	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

FILING ENTITY: ANY COMPANY

COMMON LINE NORMALIZED DEMAND - MOU

(MINUTES IN THOUSANDS)

HISTORICAL PERIOD DERIVED		PREMIUM CCL MOU			NON-PREMIUM CCL MOU			TOTAL CCL MOU			TOTAL CHARGEABLE CCL MOU	
		ORIG.	TERM.	TOTAL	ORIG.	TERM.	TOTAL	ORIG.	TERM.	TOTAL	ORIG.	TERM.
		(A)	(B)	(C) = A+B	(D)	(E)	(F) = D+E	(G) = A+D	(H) = B+E	(I) = C+F	(J) = A+(D*.45)	(K) = B+(E*.45)
100	JAN '90											
105	FEB '90											
110	MAR '90											
115	APR '90											
120	MAY '90											
125	JUN '90											
130	JUL '90											
135	AUG '90											
140	SEP '90											
145	OCT '90											
150	NOV '90											
155	DEC '90											
160	JAN '91											
165	FEB '91											
170	MAR '91											
175	APR '91											
180	MAY '91											
185	JUN '91											
190	JUL '91											
195	AUG '91											
200	SEP '91											
205	OCT '91											
210	NOV '91											
215	DEC '91											
220	JAN '92											
225	FEB '92											
230	MAR '92											
235	APR '92											
240	MAY '92											
245	JUN '92											
250	JUL '92											
255	AUG '92											
260	SEP '92											
265	OCT '92											
270	NOV '92											
275	DEC '92											
PROSPECTIVE PERIOD												
295	TEST PERIOD											

FILING ENTITY: ANY COMPANY

COMMON LINE NORMALIZED DEMAND - MOU

(MINUTES IN THOUSANDS)

TOTAL USERS ANALYSIS	PREMIUM CCL MOU			NON-PREMIUM CCL MOU			TOTAL CCL MOU			TOTAL CHARGEABLE CCL MOU	
	ORIG.	TERM.	TOTAL	ORIG.	TERM.	TOTAL	ORIG.	TERM.	TOTAL	ORIG.	TERM.
	(A)	(B)	(C) = A+B	(D)	(E)	(F) = D+E	(G) = A+D	(H) = B+E	(I) = C+F	(J) = A+(D*.45)	(K) = B+(E*.45)
300 1Q90											
305 2Q90											
310 3Q90											
315 4Q90											
320 1Q91											
325 2Q91											
330 3Q91											
335 4Q91											
340 1Q92											
345 2Q92											
350 3Q92											
355 4Q92											

2023

FILING ENTITY: ANY COMPANY

DMD-1
Page 3 of 5

SWITCHED TRAFFIC SENSITIVE NORMALIZED DEMAND - MOU

(MINUTES IN THOUSANDS)

HISTORICAL	PREMIUM TRAFFIC SENSITIVE MOU	NON-PREMIUM TRAFFIC SENSITIVE MOU	TOTAL TRAFFIC SENSITIVE MOU	TOTAL CHARGEABLE TRAFFIC SENSITIVE MOU
	(A)	(B)	(C) = A+B	(D) = A+(.45*B)
TOTAL USERS ANALYSIS				
360 1Q90				
365 2Q90				
370 3Q90				
375 4Q90				
380 1Q91				
385 2Q91				
390 3Q91				
395 4Q91				
400 1Q92				
405 2Q92				
410 3Q92				
415 4Q92				
PROSPECTIVE PERIOD				
450 TEST PERIOD 7/93 - 6/94				

2024

PROSPECTIVE
CARRIER COMMON LINE DEMAND - MOU

(MINUTES IN THOUSANDS)

	PREMIUM CCL MOU			NON-PREMIUM CCL MOU			TOTAL CCL MOU			TOTAL CHARGEABLE CCL MOU	
	ORIG.	TERM.	TOTAL	ORIG.	TERM.	TOTAL	ORIG.	TERM.	TOTAL	ORIG.	TERM.
	(A)	(B)	(C) = A+B	(D)	(E)	(F) = D+E	(G) = A+D	(H) = B+E	(I) = C+F	(J) = A+(D*.45)	(K) = B+(E*.45)
500 BASELINE DEMAND (NOTE 1)											
505 OUT OF TREND BYPASS											
510 RATE MAKING DEMAND TOTAL (NOTE 2)											

2025

NOTES:

(1) - BASELINE DEMAND WILL INCLUDE TRENDED BYPASS

(2) - RATEMAKING DEMAND TOTAL SHOULD AGREE WITH DMD-1, PAGE 1, ROW 295.

FILING ENTITY: ANY COMPANY

PROSPECTIVE
SWITCHED TRAFFIC SENSITIVE DEMAND - MOU

(MINUTES IN THOUSANDS)

	PREMIUM TRAFFIC SENSITIVE MOU	NON-PREMIUM TRAFFIC SENSITIVE MOU	TOTAL TRAFFIC SENSITIVE MOU	TOTAL CHARGEABLE TRAFFIC SENSITIVE MOU
	(A)	(B)	(C) = A+B	(D) = A+(.45*B)
600 BASELINE DEMAND (NOTE 1)				
605 OUT OF TREND BYPASS				
610 RATE MAKING DEMAND TOTAL (NOTE 2)				

NOTES:

(1) - BASELINE DEMAND WILL INCLUDE TRENDED BYPASS

(2) - RATEMAKING DEMAND TOTAL SHOULD AGREE WITH DMD-1, PAGE 3, ROW 450.

2026

FILING ENTITY: ANY COMPANY

SWITCHED ACCESS DEMAND - LINES

	PERIOD	TOTAL SUBCRIBER LINES EXCL. WATS (A)	PERCENT CUMULATIVE LINES CONVERTED TO EQUAL ACCESS EXCL. WATS (B)	PERCENT BUSINESS SUBSCRIBER LINES EXCL. WATS (C)
100	1Q91			
110	2Q91			
120	3Q91			
130	4Q91			
140	1Q92			
150	2Q92			
160	3Q92			
170	4Q92			
180	1/92 - 12/92 HISTORICAL			
190	1Q93			
200	2Q93			
210	7/93 - 6/94 PROSPECTIVE			
220	3Q93			
230	4Q93			
230	1Q94			
250	2Q94			

NOTE:
Line counts should be end of period for Rows 100 thru 170, 190, 200 and 220 thru 250.
Line counts for Rows 180 and 210 are averages for the periods.

2027

FILING ENTITY: ANY COMPANY

DMD - 3
Page 1 of 1

MINUTES OF USE DEMAND COMPARISON

(MINUTES IN THOUSANDS)

			COMMON LINE MOU (A)	TRAFFIC SENSITIVE MOU (B)
100	Prospective 7/93 - 6/94			
110	Historical 1/92 - 12/92	(1)		
120	Historical 7/92 - 12/92	(1)		
130	Historical 7/91 - 6/92	(1)		
140	Prospective 7/91 - 6/92	(2)		
150	Historical 7/90 - 6/91	(1)		
160	Prospective 7/90 - 6/91	(3)		

NOTES:
(1) Actual Operating Statistics

(2) From 1991 TRP DMD-3

(3) From 1990 TRP DMD-3

FILING ENTITY: ANY COMPANY

SPECIAL ACCESS
CIRCUIT DEMAND

	HISTORICAL PERIOD	METALLIC (A)	TELEGRAPH (B)	AUDIO PART TIME (C)	VOICE GRADE (EXCLU WATS) (D)	WATS (E)	VIDEO PART TIME (F)
100	Jan. '90						
105	Feb. '90						
110	Mar. '90						
115	Apr. '90						
120	May. '90						
125	Jun. '90						
130	Jul. '90						
135	Aug. '90						
140	Sep. '90						
145	Oct. '90						
150	Nov. '90						
155	Dec. '90						
160	Jan. '91						
165	Feb. '91						
170	Mar. '91						
175	Apr. '91						
180	May. '91						
185	Jun. '91						
190	Jul. '91						
195	Aug. '91						
200	Sep. '91						
205	Oct. '91						
210	Nov. '91						
215	Dec. '91						
220	Jan. '92						
225	Feb. '92						
230	Mar. '92						
235	Apr. '92						
240	May. '92						
245	Jun. '92						
250	Jul. '92						
255	Aug. '92						
260	Sep. '92						
265	Oct. '92						
270	Nov. '92						
275	Dec. '92						
280	AVERAGE FOR PROSPECTIVE PERIOD 7/93 - 6/94						

2029

FILING ENTITY: ANY COMPANY

SPECIAL ACCESS CIRCUIT DEMAND

	HISTORICAL PERIOD	AUDIO PROGRAM (G)	VIDEO (H)	DS1 (I)	DIG DATA SERVICE (J)	WIDEBAND (K)	DS3 (L)
100	Jan. '90						
105	Feb. '90						
110	Mar. '90						
115	Apr. '90						
120	May '90						
125	Jun. '90						
130	Jul. '90						
135	Aug. '90						
140	Sep. '90						
145	Oct. '90						
150	Nov. '90						
155	Dec. '90						
160	Jan. '91						
165	Feb. '91						
170	Mar. '91						
175	Apr. '91						
180	May. '91						
185	Jun. '91						
190	Jul. '91						
195	Aug. '91						
200	Sep. '91						
205	Oct. '91						
210	Nov. '91						
215	Dec. '91						
220	Jan. '92						
225	Feb. '92						
230	Mar. '92						
235	Apr. '92						
240	May. '92						
245	Jun. '92						
250	Jul. '92						
255	Aug. '92						
260	Sep. '92						
265	Oct. '92						
270	Nov. '92						
275	Dec. '92						
280	AVERAGE FOR PROSPECTIVE PERIOD 7/93 - 6/94						

2030

FILING ENTITY: ANY COMPANY

SPECIAL ACCESS
CHANNEL TERMINATION DEMAND

	HISTORICAL PERIOD	METALLIC	TELEGRAPH 2 WIRE	TELEGRAPH 4 WIRE	AUDIO PART TIME	VOICE GRADE (EXCL WATS) 2 WIRE	VOICE GRADE (EXCL WATS) 4 WIRE	WATS 2 WIRE	WATS 4 WIRE	VIDEO PART TIME
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)
285	Jan. '90									
290	Feb. '90									
295	Mar. '90									
300	Apr. '90									
305	May '90									
310	Jun. '90									
315	Jul. '90									
320	Aug. '90									
325	Sep. '90									
330	Oct. '90									
335	Nov. '90									
340	Dec. '90									
345	Jan. '91									
350	Feb. '91									
355	Mar. '91									
360	Apr. '91									
365	May. '91									
370	Jun. '91									
375	Jul. '91									
380	Aug. '91									
385	Sep. '91									
390	Oct. '91									
395	Nov. '91									
400	Dec. '91									
405	Jan. '92									
410	Feb. '92									
415	Mar. '92									
420	Apr. '92									
425	May. '92									
430	Jun. '92									
435	Jul. '92									
440	Aug. '92									
445	Sep. '92									
450	Oct. '92									
455	Nov. '92									
460	Dec. '92									
465	AVERAGE FOR PROSPECTIVE PERIOD 7/93 - 6/94									

FILING ENTITY: ANY COMPANY

		SPECIAL ACCESS CHANNEL TERMINATION DEMAND					
		AUDIO PROGRAM	VIDEO	DS1	DIG DATA SERVICE	WIDEBAND	DS3
	HISTORICAL PERIOD	(J)	(K)	(L)	(M)	(N)	(O)
285	Jan. '90						
290	Feb. '90						
295	Mar. '90						
300	Apr. '90						
305	May '90						
310	Jun. '90						
315	Jul. '90						
320	Aug. '90						
325	Sep. '90						
330	Oct. '90						
335	Nov. '90						
340	Dec. '90						
345	Jan. '91						
350	Feb. '91						
355	Mar. '91						
360	Apr. '91						
365	May. '91						
370	Jun. '91						
375	Jul. '91						
380	Aug. '91						
385	Sep. '91						
390	Oct. '91						
395	Nov. '91						
400	Dec. '91						
405	Jan. '92						
410	Feb. '92						
415	Mar. '92						
420	Apr. '92						
425	May. '92						
430	Jun. '92						
435	Jul. '92						
440	Aug. '92						
445	Sep. '92						
450	Oct. '92						
455	Nov. '92						
460	Dec. '92						
	AVERAGE FOR PROSPECTIVE PERIOD						
465	7/93 - 6/94						

FILING ENTITY: ANY COMPANY

SPECIAL ACCESS
INTEROFFICE MILEAGE DEMAND

	HISTORICAL PERIOD DERIVED	METALLIC (A)	TELEGRAPH (B)	AUDIO PART TIME (C)	VOICE GRADE (EXCLU WATS) (D)	WATS (E)	VIDEO PART TIME (F)
470	Jan. '90						
475	Feb. '90						
480	Mar. '90						
485	Apr. '90						
490	May '90						
495	Jun. '90						
500	Jul. '90						
505	Aug. '90						
510	Sep. '90						
515	Oct. '90						
520	Nov. '90						
525	Dec. '90						
530	Jan. '91						
535	Feb. '91						
540	Mar. '91						
545	Apr. '91						
550	May. '91						
555	Jun. '91						
560	Jul. '91						
565	Aug. '91						
570	Sep. '91						
575	Oct. '91						
580	Nov. '91						
585	Dec. '91						
590	Jan. '92						
595	Feb. '92						
600	Mar. '92						
605	Apr. '92						
610	May. '92						
615	Jun. '92						
620	Jul. '92						
625	Aug. '92						
630	Sep. '92						
635	Oct. '92						
640	Nov. '92						
645	Dec. '92						
650	AVERAGE FOR PROSPECTIVE PERIOD 7/93 - 6/94						

FILING ENTITY: ANY COMPANY

	HISTORICAL PERIOD DERIVED	SPECIAL ACCESS INTEROFFICE MILEAGE DEMAND					
		AUDIO PROGRAM	VIDEO	DS1	DIG DATA SERVICE	WIDEBAND	DS3
		(G)	(H)	(I)	(J)	(K)	(L)
470	Jan. '90						
475	Feb. '90						
480	Mar. '90						
485	Apr. '90						
490	May '90						
495	Jun. '90						
500	Jul. '90						
505	Aug. '90						
510	Sep. '90						
515	Oct. '90						
520	Nov. '90						
525	Dec. '90						
530	Jan. '91						
535	Feb. '91						
540	Mar. '91						
545	Apr. '91						
550	May. '91						
555	Jun. '91						
560	Jul. '91						
565	Aug. '91						
570	Sep. '91						
575	Oct. '91						
580	Nov. '91						
585	Dec. '91						
590	Jan. '92						
595	Feb. '92						
600	Mar. '92						
605	Apr. '92						
610	May. '92						
615	Jun. '92						
620	Jul. '92						
625	Aug. '92						
630	Sep. '92						
635	Oct. '92						
640	Nov. '92						
645	Dec. '92						
650	AVERAGE FOR PROSPECTIVE PERIOD 7/93 - 6/94						

SPECIAL ACCESS
CHANNEL MILEAGE DEMAND COMPARISON
BY RATE BAND

		1/92 - 12/92 HISTORICAL (A)				7/93 - 6/94 PROSPECTIVE (B)			
		MILEAGE BAND		DEMAND		MILEAGE BAND		DEMAND	
		LOW	HIGH	CKTS	IOM	LOW	HIGH	CKTS	IOM
			METALLIC						
701									
702									
703									
704									
705									
706									
707									
708									
709									
710	TOTAL -->	N/A	N/A			N/A	N/A		
			TELEGRAPH						
711									
712									
713									
714									
715									
716									
717									
718									
719									
720	TOTAL -->	N/A	N/A			N/A	N/A		
			AUDIO PART TIME						
721									
722									
723									
724									
725									
726									
727									
728									
729									
730	TOTAL -->	N/A	N/A			N/A	N/A		
			VOICE GRADE (EXCL WATS)						
731									
732									
733									
734									
735									
736									
737									
738									
739									
740	TOTAL -->	N/A	N/A			N/A	N/A		

SPECIAL ACCESS
CHANNEL MILEAGE DEMAND COMPARISON
BY RATE BAND

		1/92 - 12/92 HISTORICAL (A)				7/93 - 6/94 PROSPECTIVE (B)			
		MILEAGE BAND		DEMAND		MILEAGE BAND		DEMAND	
		LOW	HIGH	CKTS	IOM	LOW	HIGH	CKTS	IOM
			WATS						
741									
742									
743									
744									
745									
746									
747									
748									
749									
750	TOTAL -->	N/A	N/A			N/A	N/A		
			VIDEO PART TIME						
751									
752									
753									
754									
755									
756									
757									
758									
759									
760	TOTAL -->	N/A	N/A			N/A	N/A		
			AUDIO PROGRAM						
761									
762									
763									
764									
765									
766									
767									
768									
769									
770	TOTAL -->	N/A	N/A			N/A	N/A		
			VIDEO						
771									
772									
773									
774									
775									
776									
777									
778									
779									
780	TOTAL -->	N/A	N/A			N/A	N/A		

SPECIAL ACCESS
CHANNEL MILEAGE DEMAND COMPARISON
BY RATE BAND

		1/92 - 12/92 HISTORICAL (A)				7/93 - 6/94 PROSPECTIVE (B)			
		MILEAGE BAND		DEMAND		MILEAGE BAND		DEMAND	
		LOW	HIGH	CKTS	IOM	LOW	HIGH	CKTS	IOM
			DS1						
781									
782									
783									
784									
785									
786									
787									
788									
789									
790	TOTAL -->	N/A	N/A			N/A	N/A		
			DIGITAL DATA SERVICE						
791									
792									
793									
794									
795									
796									
797									
798									
799									
800	TOTAL -->	N/A	N/A			N/A	N/A		
			WIDEBAND						
801									
802									
803									
804									
805									
806									
807									
808									
809									
810	TOTAL -->	N/A	N/A			N/A	N/A		
			DS3						
811									
812									
813									
814									
815									
816									
817									
818									
819									
820	TOTAL -->	N/A	N/A			N/A	N/A		

FILING ENTITY: ANY COMPANY

COMMON LINE DEMAND (MINUTES IN THOUSANDS)

	PERIOD	CARRIER COMMON LINE			SINGLE-LINE BUSINESS	RESIDENCE C.P.T.		MULTILINE BUSINESS	CENTRX CO AND CTX LIKE LINES	SPECIAL ACCESS LINES SUBJECT TO SURCHARGE
		ORIG.	TERM.	TOTAL	C.P.T.	LIFELINE	NON-LIFELINE	(NOTE 1)	(NOTE 2)	
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)
100	1Q90									
110	2Q90									
120	3Q90									
130	4Q90									
140	1Q91									
150	2Q91									
160	3Q91									
170	4Q91									
180	1Q92									
190	2Q92									
200	3Q92									
210	4Q92									
220	7/93 - 6/94 PROSPECTIVE									

NOTES:
(1) - Multi line business excluding WATS, includes CTX-CO with in service dates post 7/83.
(2) - Centrex CO and CTX like lines reflect revenues for lines in service pre 7/83.

FILING ENTITY: ANY COMPANY

COMMON LINE REVENUES (DOLLARS IN THOUSANDS)

	PERIOD	CARRIER COMMON LINE			SINGLE-LINE BUSINESS C.P.T.	RESIDENCE C.P.T.		MULTILINE BUSINESS (NOTE 1)	CENTRX CO AND CTX LIKE LINES (NOTE 2)	SPECIAL ACCESS LINES SUBJECT TO SURCHARGE
		ORIG.	TERM.	TOTAL		LIFELINE	NON-LIFELINE			
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)
300	1Q90									
310	2Q90									
320	3Q90									
330	4Q90									
340	1Q91									
350	2Q91									
360	3Q91									
370	4Q91									
380	1Q92									
390	2Q92									
400	3Q92									
410	4Q92									
420	7/93 - 6/94 PROSPECTIVE									

NOTES:
(1) - Multi line business excluding WATS, includes CTX-CO with in service dates post 7/83.
(2) - Centrex CO and CTX like lines reflect revenues for lines in service pre 7/83.

FILING ENTITY: ANY COMPANY

END USER AND SWITCHED ACCESS RATE ANALYSIS

		7/1/92 RATE	CURRENTLY EFFECTIVE RATE	PROPOSED 7/1/93 RATE	PROPOSED TO 7/1/92 % CHANGE	PROPOSED TO CURRENT % CHANGE
		(A)	(B) (NOTE 1)	(C)	(D)=((C-A)/A)*100	(E)=((C-B)/B)*100
	A. SWITCHED ACCESS RATES					
110	Premium CCL Terminating Rate, Cents Per Minute					
120	Non-Premium Terminating CCL Rate, Cents Per Minute					
130	Premium Switching Rate, (Average) Cents Per Minute					
140	Non-Premium Switching Rate, (Average) Cents Per Minute					
150	Premium Local Transport Rate, (Average) Cents Per Minute					
160	Non-Premium Local Transport Rate, (Average) Cents Per Minute					
170	Equal Access Per _____					
180	Non-Recurring Charge Per _____					
	B. END USER CHARGES					
190	Multiline Business					
200	Residence and Single-Line Bus.					
	C. DIRECTORY ASSISTANCE					
210	Operator, Cents Per Call (Information Rate)					
220	Transport, Cents Per Call (Avg. Transport Rate)					
230	Total, Cents Per Call					
240	Flat Rate					

NOTE 1: IF CURRENT RATES IN COL B DIFFER FROM COL A, EXCHANGE CARRIERS SHOULD INDICATE IN A FOOTNOTE THE EFFECTIVE DATE OF THE COL B RATE.

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FILING ENTITY: ANY COMPANY

SPECIAL ACCESS RATE ANALYSIS

	SPECIAL ACCESS	7/1/92 RATE (A)	CURRENTLY EFFECTIVE RATE (B) (NOTE 1)	PROPOSED 7/1/93 RATE (C)	PROPOSED TO 7/1/92 % CHANGE (D)=((C-A)/A)*100	PROPOSED TO CURRENT % CHANGE (E)=((C-B)/B)*100
100	2W VG. 0 Mile Trans.					
110	2W VG. 10 Mile Trans.					
120	4W VG. 0 Mile Trans.					
130	4W VG. 10 Mile Trans.					
140	DA1 0 Mile Trans.					
150	DA1 10 Mile Trans.					
160	DA2 0 Mile Trans.					
170	DA2 10 Mile Trans.					
180	DA3 0 Mile Trans.					
190	DA3 10 Mile Trans.					
200	DA4 0 Mile Trans.					
210	DA4 10 Mile Trans.					
220	Hicap 0 Mile Trans.					
230	Hicap 10 Mile Trans.					
240	DS3 0 Mile Trans.					
250	DS3 10 Mile Trans.					

NOTE 1: IF CURRENT RATES IN COL B DIFFER FROM COL A, EXCHANGE CARRIERS SHOULD INDICATE IN A FOOTNOTE THE EFFECTIVE DATE OF THE COL B RATE.

FILING ENTITY: ANY COMPANY

ANNUALIZED
ACCESS PRICEOUT
COMPARISONS

		Revenue at 7/1/92 Rate	Revenue at Current Rate	Change (B)-(A)	Revenue at Proposed Rate 7/1/93	Change (D)-(B)
		(A)	(B)	(C)=B-A	(D)	(E)
100	Multi-Line Business					
110	Residence and Single-Line Business					
120	CCL					
130	Switching					
140	Local Transport					
150	Information					
160	Equal Access					
170	Special Access					

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NOTES:
(1) Historical demand quantities for the PYCOS period, 1/92 through 12/92, should be uniformly applied to different rate schedules to obtain price-outs.

(2) All non-recurring charges should be included. EA should also be included.

FILING ENTITY: ANY COMPANY

RATE OF RETURN COMPARISON

		FCC MONITORING PERIOD 1/89 - 12/90	FCC MONITORING PERIOD 1/91 - 12/92	1/92 - 12/92	7/93 - 6/94 PROSPECTIVE
		(A)	(B)	(C)	(D)
100	Common Line				
110	Traffic Sensitive Switched				
120	Switching				
130	Local Transport				
140	Information				
150	Equal Access				
160	Traffic Sensitive - Special				
170	Traffic Sensitive - Total				
180	Total Rate of Return Regulated IS Access				

NOTES:

GENERAL - Companies should list all proposed rate affecting tariff revisions for the historic periods and provide Transmittal number, filing date, requested changes, action taken, and effective date, if applicable, in a footnote.

FILING ENTITY: ANY COMPANY

TEST PERIOD 7/93 TO 6/94 ACCESS REVENUE REQUIREMENTS
DEMAND AND RATE RECONCILIATION - SWITCHED ACCESS
(MINUTES AND REVENUES IN THOUSANDS)

		MILEAGE BAND		RATES PER			RATE MAKING DEMAND PER			ANTICIPATED REVENUE	REVENUE REQUIREMENT
		LOW	HIGH	MIN/MSG	MIN MILE	LINE OR TRK	MIN/MSG	MIN MILE	LINE OR TRK		
	COMMON LINE	(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)(NOTE 1)	(J)
100	Multiline Business EUCL	N/A	N/A	N/A	N/A		N/A	N/A			N/A
110	Single Line Bus. EUCL	N/A	N/A	N/A	N/A		N/A	N/A			N/A
120	Centrex EUCL (Pre 7/83)	N/A	N/A	N/A	N/A		N/A	N/A			N/A
130	Residence EUCL	N/A	N/A	N/A	N/A		N/A	N/A			N/A
140	Sp. Access Line Surchrge	N/A	N/A	N/A	N/A		N/A	N/A			N/A
150	Terminating CCL Premium	N/A	N/A		N/A	N/A		N/A	N/A		N/A
160	Terminating CCL NonPrem	N/A	N/A		N/A	N/A		N/A	N/A		N/A
170	Originating CCL Premium	N/A	N/A		N/A	N/A		N/A	N/A		N/A
180	Originating CCL NonPrem	N/A	N/A		N/A	N/A		N/A	N/A		N/A
190	Common Line - Total	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A		
	INFORMATION										
200	Information - Per Msg.	N/A	N/A		N/A	N/A		N/A	N/A		N/A
210	Information - Per Min.	N/A	N/A		N/A	N/A		N/A	N/A		N/A
220	Information - Surcharge	N/A	N/A		N/A			N/A			N/A
230	Information - Other	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A		N/A
240	Information - Total	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A		
	SWITCHING										
250	Premium Switching	N/A	N/A		N/A	N/A		N/A	N/A		N/A
260	Non-Prem Switching	N/A	N/A		N/A	N/A		N/A	N/A		N/A
270	Other Switching	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A		N/A
280	Switching - Total	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A		

NOTES:

1 - Col. I = C*F or D*G or E*N except Rows 190, 270, 280, 340 and 350 where:
Row 190 Col. I = Sum (Rows 100 thru 180)
Row 240 Col. I = Sum (Rows 200 thru 230)
Row 270 Col. I = Input Value
Row 280 Col. I = Sum (Rows 250 thru 270)
Row 340 Col. I = Input Value
Row 350 Col. I = Sum (Rows 290 thru 340)

TEST PERIOD 7/93 TO 6/94 ACCESS REVENUE REQUIREMENTS
DEMAND AND RATE RECONCILIATION - SWITCHED ACCESS
(MINUTES AND REVENUES IN THOUSANDS)

		MILEAGE BAND		RATES PER			RATE MAKING DEMAND PER			ANTICIPATED	REVENUE
		LOW	HIGH	MIN/MSG	MIN MILE	LINE OR TRK	MIN/MSG	MIN MILE	LINE OR TRK	REVENUE	REQUIREMEN
	PREMIUM LOCAL TRANSPORT	(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)(NOTE 1)	(J)
290	Local Trans. - MB1				N/A	N/A		N/A	N/A		N/A
291	Local Trans. - MB2				N/A	N/A		N/A	N/A		N/A
292	Local Trans. - MB3				N/A	N/A		N/A	N/A		N/A
293	Local Trans. - MB4				N/A	N/A		N/A	N/A		N/A
294	Local Trans. - MB5				N/A	N/A		N/A	N/A		N/A
295	Local Trans. - MB6				N/A	N/A		N/A	N/A		N/A
296	Local Trans. - MB7				N/A	N/A		N/A	N/A		N/A
297	Local Trans. - MB8				N/A	N/A		N/A	N/A		N/A
298	Local Trans. - MB9				N/A	N/A		N/A	N/A		N/A
299	Local Trans. - MB10				N/A	N/A		N/A	N/A		N/A
300	MMUC Per Line Or Trunk	N/A	N/A	N/A	N/A		N/A	N/A			N/A
301	Termination	N/A	N/A		N/A	N/A		N/A	N/A		N/A
302	Facility	N/A	N/A	N/A		N/A	N/A		N/A		N/A
	NON-PREMIUM LOCAL TRANSPORT										
310	Local Trans. - MB1				N/A	N/A		N/A	N/A		N/A
311	Local Trans. - MB2				N/A	N/A		N/A	N/A		N/A
312	Local Trans. - MB3				N/A	N/A		N/A	N/A		N/A
313	Local Trans. - MB4				N/A	N/A		N/A	N/A		N/A
314	Local Trans. - MB5				N/A	N/A		N/A	N/A		N/A
315	Local Trans. - MB6				N/A	N/A		N/A	N/A		N/A
316	Local Trans. - MB7				N/A	N/A		N/A	N/A		N/A
317	Local Trans. - MB8				N/A	N/A		N/A	N/A		N/A
318	Local Trans. - MB9				N/A	N/A		N/A	N/A		N/A
319	Local Trans. - MB10				N/A	N/A		N/A	N/A		N/A
320	MMUC Per Line Or Trunk	N/A	N/A	N/A	N/A		N/A	N/A			N/A
321	Termination	N/A	N/A		N/A	N/A		N/A	N/A		N/A
322	Facility	N/A	N/A	N/A		N/A	N/A		N/A		N/A
.330	Transport Installation Per Line Or Trunk	N/A	N/A	N/A	N/A		N/A	N/A			N/A
340	Other Transport	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A		N/A
350	Local Trans. - Total	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A		

NOTES:

1 - Col. I = C*F or D*G or E*N except Rows 190, 270, 280, 340 and 350 where:
Row 190 Col. I = Sum (Rows 100 thru 180)
Row 240 Col. I = Sum (Rows 200 thru 230)
Row 270 Col. I = Input Value
Row 280 Col. I = Sum (Rows 250 thru 270)
Row 340 Col. I = Input Value
Row 350 Col. I = Sum (Rows 290 thru 340)

FILING ENTITY: ANY COMPANY

TEST PERIOD 7/93 TO 6/94 ACCESS REVENUE REQUIREMENTS
DEMAND AND RATE RECONCILIATION - SPECIAL ACCESS
(MINUTES AND REVENUES IN THOUSANDS)

		MILEAGE BAND		RATES		RATE MAKING DEMAND		ANTICIPATED
		LOW	HIGH	FIXED	PER UNIT	FIXED Q	VAR UNITS	REVENUE
	VOICE GRADE	(A)	(B)	(C)	(D)	(E)	(F)	(G)=(C*E)+(D*F)
360	Chan Term - 2 Wire	N/A	N/A	N/A		N/A		
370	Chan Term - 4 Wire	N/A	N/A	N/A		N/A		
	INTER-OFFICE MILEAGE							
380	Voice Grade - MB1							
381	Voice Grade - MB2							
382	Voice Grade - MB3							
383	Voice Grade - MB4							
384	Voice Grade - MB5							
385	Voice Grade - MB6							
386	Voice Grade - MB7							
387	Voice Grade - MB8							
388	Voice Grade - MB9							
389	Voice Grade - MB10							
390	Voice Grade - Total	N/A	N/A	N/A	N/A	N/A	N/A	
400	Non-Recurring	N/A	N/A	N/A	N/A	N/A	N/A	
	HIGH CAPACITY							
410	Channel Termination	N/A	N/A	N/A		N/A		
	INTER-OFFICE MILEAGE							
420	High Capacity - MB1							
421	High Capacity - MB2							
422	High Capacity - MB3							
423	High Capacity - MB4							
424	High Capacity - MB5							
425	High Capacity - MB6							
426	High Capacity - MB7							
427	High Capacity - MB8							
428	High Capacity - MB9							
429	High Capacity - MB10							
430	High Capacity - Total	N/A	N/A	N/A	N/A	N/A		
440	Non-Recurring	N/A	H/A	N/A	N/A	N/A		

FILING ENTITY: ANY COMPANY

TEST PERIOD 7/93 TO 6/94 ACCESS REVENUE
(REVENUES IN THOUSANDS)

Classifications	Common Line	Traffic Sensitive					Special Access	Total Access
		Switching	Equal Access	Transport	Information	Total		
Revenues	(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H) = A+F+G
100 Network Access								
110 Nonrecurring Charges excl ICBs								
120 Recurring Charges excl ICBs								
130 Individual Case Basis Rates								

FILING ENTITY: ANY COMPANY

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EFFECT OF BASIC STUDIES EFFECTIVE ON 7/1/93

BASIC STUDIES	EUCL (A)	CCL (B)	TS-SWITCHING (C)	TS-LOCAL TRANSPORT (D)	TS-EQUAL ACCESS (E)	TS-INFORMATION (F)	SPECIAL ACCESS (G)
100							
110							
120							
130							
140							
150							
160							
170							
180							
190							
200							
210							
220							
230							

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Attachment C

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)
	)
Commission Requirements	)
for Cost Support Material	)
To Be Filed with 1993 Annual	)
Access Tariffs	)

Approved by OMB
3060-0400
Expires 07/31/93
See below for information regarding public burden estimate

NOTICE: The Tariff Review Plan (TRP) contains requirements for summary cost support material that certain local exchange carriers (LECs) must file to support their annual access charge tariff filings in partial fulfillment of Sections 61.38 and 61.44 through 61.49 of the Commission's Rules. The TRPs specify basic cost and demand information in a consistent format and are essential components of the Commission's access tariff review process. The information in the TRP is used by the FCC to evaluate rates. Your response is mandatory. Public reporting burden for this collection of information is estimated to average 150 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Federal Communications Commission, Office of Managing Director, Washington, DC 20554, and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC, 20503.

Filing Entity:

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TIER 2
PROSPECTIVE COST ANALYSIS SUMMARY

	TEST YEAR FORECAST 7/93 THRU 6/94	TOTAL COMPANY	ADJUSTMENTS		TOTAL COMPANY SUBJECT TO SEPARATIONS
			PART 64	OTHER	
		(A)	(B)	(C)	(D)=A-B-C
	REVENUES				
100	Network Access	N/A	N/A	N/A	N/A
110	Uncollectibles	N/A	N/A	N/A	N/A
120	Common Line Support	N/A	N/A	N/A	N/A
130	Long Term	N/A	N/A	N/A	N/A
140	Transitional	N/A	N/A	N/A	N/A
150	Miscellaneous	N/A	N/A	N/A	N/A
160	Net Revenues	N/A	N/A	N/A	N/A
	EXPENSES				
170	Plant Specific	N/A	N/A	N/A	N/A
180	Plant Non Specific excl Depr & Amort	N/A	N/A	N/A	N/A
190	Depreciation/Amortization				
200	Customer Operations	N/A	N/A	N/A	N/A
210	Access	N/A	N/A	N/A	N/A
220	Corporate Operations	N/A	N/A	N/A	N/A
230	AFUDC	N/A	N/A	N/A	N/A
240	Other Expenses and Adjustments	N/A	N/A	N/A	N/A
250	Taxes Other than FIT	N/A	N/A	N/A	N/A
260	Total Expenses and Other Taxes	N/A	N/A	N/A	N/A
	FIT ADJUSTMENTS				
270	Adjustments for FIT				
280	Amortized ITC				
290	Federal Income Taxes	N/A	N/A	N/A	N/A
300	TOTAL EXPENSES AND TAXES	N/A	N/A	N/A	N/A
	TELEPHONE PLANT IN SERVICE				
310	General Support				
320	Central Office Equipment - Switch				
330	Central Office Equipment - Trans				
340	Cable and Wire				
350	Info Orig/Term Equipment				
360	Amortizable Assets				
370	Total Plant in Service				
	ADJUSTMENTS TO TPIS				
380	Depreciation/Amortization Reserve				
390	Accum. Deferred Income Tax				
400	Other Rate Base Adjustments	N/A	N/A	N/A	N/A
	RETURN DATA				
410	Average Rate Base	N/A	N/A	N/A	N/A
420	Return	N/A	N/A	N/A	N/A
430	Rate of Return	N/A	N/A	N/A	N/A

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Filing Entity:

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TIER 2
PROSPECTIVE COST ANALYSIS SUMMARY

	TEST YEAR FORECAST 7/93 THRU 6/94	INTERSTATE	BILLING & COLLECTION	INTEREXCHANGE	ROR REGULATD IS ACCESS
		(E)	(F)	(G)	(H)=E-F-G
	REVENUES				
100	Network Access	N/A	N/A	N/A	
110	Uncollectibles	N/A	N/A	N/A	
120	Common Line Support (NOTE 1)	N/A	N/A	N/A	
130	Long Term	N/A	N/A	N/A	
140	Transitional	N/A	N/A	N/A	
150	Miscellaneous	N/A	N/A	N/A	
160	Net Revenues	N/A	N/A	N/A	
	EXPENSES				
170	Plant Specific				
180	Plant Non Specific excl Depr & Amort				
190	Depreciation/Amortization				
200	Customer Operations				
210	Access		N/A		N/A
220	Corporate Operations				
230	AFUDC	N/A	N/A	N/A	
240	Other Expenses and Adjustments				
250	Taxes Other than FIT				
260	Total Expenses and Other Taxes				
	FIT ADJUSTMENTS				
270	Adjustments for FIT				
280	Amortized ITC				
290	Federal Income Taxes		N/A	N/A	
300	TOTAL EXPENSES AND TAXES		N/A	N/A	
	TELEPHONE PLANT IN SERVICE				
310	General Support				
320	Central Office Equipment - Switch				
330	Central Office Equipment - Trans				
340	Cable and Wire				
350	Info Orig/Term Equipment				
360	Amortizable Assets				
370	Total Plant in Service				
	ADJUSTMENTS TO TPIS				
380	Depreciation/Amortization Reserve				
390	Accum. Deferred Income Tax				
400	Other Rate Base Adjustments				
	RETURN DATA				
410	Average Rate Base		N/A	N/A	
420	Return	N/A	N/A	N/A	
430	Rate of Return	N/A	N/A	N/A	

NOTE 1: CCL support data contained on Lines 120 thru 140 is not applicable for companies that participate in the NECA pool.

Filing Entity:

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TIER 2
PROSPECTIVE COST ANALYSIS SUMMARY

	TEST YEAR FORECAST 7/93 THRU 6/94	COMMON LINE PAY PHONE (I)	COMMON LINE INSIDE WIRE (J)	COMMON LINE BFP (K)	COMMON LINE TOTAL (L)=I+J+K
	REVENUES				
100	Network Access				
110	Uncollectibles				
120	Common Line Support (NOTE 1)				
130	Long Term				
140	Transitional				
150	Miscellaneous				
160	Net Revenues				
	EXPENSES				
170	Plant Specific				
180	Plant Non Specific excl Depr & Amort				
190	Depreciation/Amortization				
200	Customer Operations	N/A	N/A	N/A	N/A
210	Access				
220	Corporate Operations				
230	AFUDC				
240	Other Expenses and Adjustments				
250	Taxes Other than FIT				
260	Total Expenses and Other Taxes				
	FIT ADJUSTMENTS				
270	Adjustments for FIT				
280	Amortized ITC				
290	Federal Income Taxes				
300	TOTAL EXPENSES AND TAXES				
	TELEPHONE PLANT IN SERVICE				
310	General Support				
320	Central Office Equipment - Switch				
330	Central Office Equipment - Trans				
340	Cable and Wire				
350	Info Orig/Term Equipment				
360	Amortizable Assets				
370	Total Plant in Service				
	ADJUSTMENTS TO TPIS				
380	Depreciation/Amortization Reserve				
390	Accum. Deferred Income Tax				
400	Other Rate Base Adjustments				
	RETURN DATA				
410	Average Rate Base				
420	Return				
430	Rate of Return				

NOTE 1: CCL support data contained on Lines 120 thru 140 is not applicable for companies that participate in the NECA pool.

Filing Entity:

T2COS-1(P)
PAGE 4 OF 4

TIER 2
PROSPECTIVE COST ANALYSIS SUMMARY

	TEST YEAR FORECAST 7/93 THRU 6/94	SWITCHED TRAFFIC SENSITIVE: LOCAL SWITCHING	EQUAL ACCESS	LOCAL TRANSPORT	INFORMATION	TOTAL SWTCH TRFFC SNSTV	SPECIAL ACCESS
		(M)	(N)	(O)	(P)	(Q)=M+N+O+P	(R)
	REVENUES						
100	Network Access						
110	Uncollectibles						
120	Common Line Support	N/A	N/A	N/A	N/A	N/A	N/A
130	Long Term	N/A	N/A	N/A	N/A	N/A	N/A
140	Transitional	N/A	N/A	N/A	N/A	N/A	N/A
150	Miscellaneous						
160	Net Revenues						
	EXPENSES						
170	Plant Specific						
180	Plant Non Specific excl Depr & Amort						
190	Depreciation/Amortization						
200	Customer Operations						
210	Access	N/A	N/A	N/A	N/A	N/A	N/A
220	Corporate Operations						
230	AFUDC						
240	Other Expenses and Adjustments						
250	Taxes Other than FIT						
260	Total Expenses and Other Taxes						
	FIT ADJUSTMENTS						
270	Adjustments for FIT						
280	Amortized ITC						
290	Federal Income Taxes						
300	TOTAL EXPENSES AND TAXES						
	TELEPHONE PLANT IN SERVICE						
310	General Support						
320	Central Office Equipment - Switch						
330	Central Office Equipment - Trans						
340	Cable and Wire						
350	Info Orig/Term Equipment						
360	Amortizable Assets						
370	Total Plant in Service						
	ADJUSTMENTS TO TPIS						
380	Depreciation/Amortization Reserve						
390	Accum. Deferred Income Tax						
400	Other Rate Base Adjustments						
	RETURN DATA						
410	Average Rate Base						
420	Return						
430	Rate of Return						

Filing Entity:

T2COS-1(H)
PAGE 1 OF 4

TIER 2
HISTORIC COST ANALYSIS SUMMARY

	PYCOS PERIOD 1/92 THRU 12/92	TOTAL COMPANY	ADJUSTMENTS		TOTAL COMPANY SUBJECT TO SEPARATIONS
			PART 64	OTHER	
		(A)	(B)	(C)	(D)=A-B-C
	REVENUES				
100	Network Access	N/A	N/A	N/A	N/A
110	Uncollectibles	N/A	N/A	N/A	N/A
120	Common Line Support	N/A	N/A	N/A	N/A
130	Long Term	N/A	N/A	N/A	N/A
140	Transitional	N/A	N/A	N/A	N/A
150	Miscellaneous	N/A	N/A	N/A	N/A
160	Net Revenues	N/A	N/A	N/A	N/A
	EXPENSES				
170	Plant Specific	N/A	N/A	N/A	N/A
180	Plant Non Specific excl Depr & Amort	N/A	N/A	N/A	N/A
190	Depreciation/Amortization				
200	Customer Operations	N/A	N/A	N/A	N/A
210	Access	N/A	N/A	N/A	N/A
220	Corporate Operations	N/A	N/A	N/A	N/A
230	AFUDC	N/A	N/A	N/A	N/A
240	Other Expenses and Adjustments	N/A	N/A	N/A	N/A
250	Taxes Other than FIT	N/A	N/A	N/A	N/A
260	Total Expenses and Other Taxes	N/A	N/A	N/A	N/A
	FIT ADJUSTMENTS				
270	Adjustments for FIT				
280	Amortized ITC				
290	Federal Income Taxes	N/A	N/A	N/A	N/A
300	TOTAL EXPENSES AND TAXES	N/A	N/A	N/A	N/A
	TELEPHONE PLANT IN SERVICE				
310	General Support				
320	Central Office Equipment - Switch				
330	Central Office Equipment - Trans				
340	Cable and Wire				
350	Info Orig/Term Equipment				
360	Amortizable Assets				
370	Total Plant in Service				
	ADJUSTMENTS TO TPIS				
380	Depreciation/Amortization Reserve				
390	Accum. Deferred Income Tax				
400	Other Rate Base Adjustments	N/A	N/A	N/A	N/A
	RETURN DATA				
410	Average Rate Base	N/A	N/A	N/A	N/A
420	Return	N/A	N/A	N/A	N/A
430	Rate of Return	N/A	N/A	N/A	N/A

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Filing Entity:

T2COS-1(H)
PAGE 2 OF 4

TIER 2
HISTORIC COST ANALYSIS SUMMARY

	PYCOS PERIOD 1/92 THRU 12/92	INTERSTATE	INTERSTATE BILLING & COLLECTION	INTERSTATE INTEREXCHANGE	ROR REGULATD IS ACCESS
		(E)	(F)	(G)	(H)=E-F-G
	REVENUES				
100	Network Access	N/A	N/A	N/A	
110	Uncollectibles	N/A	N/A	N/A	
120	Common Line Support (NOTE 1)	N/A	N/A	N/A	
130	Long Term	N/A	N/A	N/A	
140	Transitional	N/A	N/A	N/A	
150	Miscellaneous	N/A	N/A	N/A	
160	Net Revenues	N/A	N/A	N/A	
	EXPENSES				
170	Plant Specific				
180	Plant Non Specific excl Depr & Amort				
190	Depreciation/Amortization				
200	Customer Operations				
210	Access		N/A		N/A
220	Corporate Operations				
230	AFUDC	N/A	N/A	N/A	
240	Other Expenses and Adjustments				
250	Taxes Other than FIT				
260	Total Expenses and Other Taxes				
	FIT ADJUSTMENTS				
270	Adjustments for FIT				
280	Amortized ITC				
290	Federal Income Taxes		N/A	N/A	
300	TOTAL EXPENSES AND TAXES		N/A	N/A	
	TELEPHONE PLANT IN SERVICE				
310	General Support				
320	Central Office Equipment - Switch				
330	Central Office Equipment - Trans				
340	Cable and Wire				
350	Info Orig/Term Equipment				
360	Amortizable Assets				
370	Total Plant in Service				
	ADJUSTMENTS TO TPIS				
380	Depreciation/Amortization Reserve				
390	Accum. Deferred Income Tax				
400	Other Rate Base Adjustments				
	RETURN DATA				
410	Average Rate Base		N/A	N/A	
420	Return	N/A	N/A	N/A	
430	Rate of Return	N/A	N/A	N/A	

NOTE 1: CCL support data contained on Lines 120 thru 140 is not applicable for companies that participate in the NECA pool.

Filing Entity:

T2COS-1(H)
PAGE 3 OF 4

TIER 2
HISTORIC COST ANALYSIS SUMMARY

	PYCOS PERIOD 1/92 THRU 12/92	COMMON LINE PAY PHONE (I)	COMMON LINE INSIDE WIRE (J)	COMMON LINE BFP (K)	TOTAL (L)=I+J+K
	REVENUES				
100	Network Access	N/A	N/A	N/A	
110	Uncollectibles	N/A	N/A	N/A	
120	Common Line Support (NOTE 1)	N/A	N/A	N/A	
130	Long Term	N/A	N/A	N/A	
140	Transitional	N/A	N/A	N/A	
150	Miscellaneous	N/A	N/A	N/A	
160	Net Revenues	N/A	N/A	N/A	
	EXPENSES				
170	Plant Specific				
180	Plant Non Specific excl Depr & Amort				
190	Depreciation/Amortization				
200	Customer Operations				
210	Access	N/A	N/A	N/A	N/A
220	Corporate Operations				
230	AFUDC				
240	Other Expenses and Adjustments				
250	Taxes Other than FIT	N/A	N/A	N/A	
260	Total Expenses and Other Taxes	N/A	N/A	N/A	
	FIT ADJUSTMENTS				
270	Adjustments for FIT				
280	Amortized ITC				
290	Federal Income Taxes	N/A	N/A	N/A	
300	TOTAL EXPENSES AND TAXES	N/A	N/A	N/A	
	TELEPHONE PLANT IN SERVICE				
310	General Support				
320	Central Office Equipment - Switch				
330	Central Office Equipment - Trans				
340	Cable and Wire				
350	Info Orig/Term Equipment				
360	Amortizable Assets				
370	Total Plant in Service				
	ADJUSTMENTS TO TPIS				
380	Depreciation/Amortization Reserve				
390	Accum. Deferred Income Tax				
400	Other Rate Base Adjustments				
	RETURN DATA				
410	Average Rate Base				
420	Return	N/A	N/A	N/A	
430	Rate of Return	N/A	N/A	N/A	

NOTE 1: CCL support data contained on Lines 120 thru 140 is not applicable for companies that participate in the NECA pool.

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Filing Entity:

T2COS-1(H)
PAGE 4 OF 4

TIER 2
HISTORIC COST ANALYSIS SUMMARY

	PYCOS PERIOD 1/92 THRU 12/92	SWITCHED TRAFFIC SENSITIVE: LOCAL SWITCHING	EQUAL ACCESS	LOCAL TRANSPORT	INFORMATION	TOTL SWTCHD TRFFC SNSTV	SPECIAL ACCESS
		(M)	(N)	(O)	(P)	(Q)=M+N+O+P	(R)
	REVENUES						
100	Network Access						
110	Uncollectibles						
120	Common Line Support	N/A	N/A	N/A	N/A	N/A	N/A
130	Long Term	N/A	N/A	N/A	N/A	N/A	N/A
140	Transitional	N/A	N/A	N/A	N/A	N/A	N/A
150	Miscellaneous						
160	Net Revenues						
	EXPENSES						
170	Plant Specific						
180	Plant Non Specific excl Depr & Amort						
190	Depreciation/Amortization						
200	Customer Operations						
210	Access	N/A	N/A	N/A	N/A	N/A	N/A
220	Corporate Operations						
230	AFUDC						
240	Other Expenses and Adjustments						
250	Taxes Other than FIT						
260	Total Expenses and Other Taxes						
	FIT ADJUSTMENTS						
270	Adjustments for FIT						
280	Amortized ITC						
290	Federal Income Taxes						
300	TOTAL EXPENSES AND TAXES						
	TELEPHONE PLANT IN SERVICE						
310	General Support						
320	Central Office Equipment - Switch						
330	Central Office Equipment - Trans						
340	Cable and Wire						
350	Info Orig/Term Equipment						
360	Amortizable Assets						
370	Total Plant in Service						
	ADJUSTMENTS TO TPIS						
380	Depreciation/Amortization Reserve						
390	Accum. Deferred Income Tax						
400	Other Rate Base Adjustments						
	RETURN DATA						
410	Average Rate Base						
420	Return						
430	Rate of Return						

Filing Entity:

TIER 2
ANALYSIS OF ACCESS ELEMENT COST DATA

	TEST YEAR FORECAST 7/93 THRU 6/94	COMMON LINE	TRAFFIC SENSITIVE		OTHER INTERSTATE	TOTAL INTERSTATE	TOTAL COMPANY (SUB TO SEP)
			SWITCHED	SPECIAL			
		(A)	(B)	(C)	(D)	(E)	(F)
	REVENUE REQUIREMENT						
100	Depreciation/Amortization						
105	Expens Less Depr & Amort						
110	Taxes Less FIT				N/A	N/A	N/A
115	Return				N/A	N/A	N/A
120	FIT				N/A	N/A	N/A
125	Uncollectibles, IDC & Other Revenue Adjustments				N/A	N/A	N/A
130	Revenue Requirements				N/A	N/A	N/A
135	Access Service Revenues				N/A	N/A	N/A
	RATE BASE						
140	Telephone Plant In Service						
145	Rate Base Adjustments						
150	Depreciation Reserve						
155	Accum. Deferred Income Tax						
160	Average Rate Base						
	HISTORICAL PERIOD 1/92 THRU 12/92						
	REVENUE REQUIREMENT						
200	Depreciation/Amortization						
205	Expens Less Depr & Amort						
210	Taxes Less FIT						N/A
215	Return						N/A
220	FIT						N/A
225	Uncollectibles, IDC & Other Revenue Adjustments						N/A
230	Revenue Requirements						N/A
235	Access Service Revenues				N/A	N/A	N/A
	RATE BASE						
240	Telephone Plant In Service						
245	Rate Base Adjustments						
250	Depreciation Reserve						
255	Accum. Deferred Income Tax						
260	Average Rate Base						

Filing Entity:

T2COS-2
PAGE 2 OF 3

TIER 2
ANALYSIS OF ACCESS ELEMENT COST DATA

	FORECAST PERIOD 7/92 THRU 6/93 (NOTE)	COMMON LINE	TRAFFIC SENSITIVE		OTHER INTERSTATE	TOTAL INTERSTATE	TOTAL COMPANY (SUB TO SEP)
			SWITCHED	SPECIAL			
		(A)	(B)	(C)	(D)	(E)	(F)
	REVENUE REQUIREMENT						
300	Depreciation/Amortization						
305	Expens Less Depr & Amort						
310	Taxes Less FIT						N/A
315	Return						N/A
320	FIT						N/A
325	Uncollectibles, IDC & Other Revenue Adjustments						N/A
330	Revenue Requirements						N/A
335	Access Service Revenues						N/A
	RATE BASE						
340	Telephone Plant In Service						
345	Rate Base Adjustments						
350	Depreciation Reserve						
355	Accum. Deferred Income Tax						
360	Average Rate Base						
	HISTORICAL PERIOD 1/92 THRU 12/92						
	REVENUE REQUIREMENT						
400	Depreciation/Amortization						
405	Expens Less Depr & Amort						
410	Taxes Less FIT						N/A
415	Return						N/A
420	FIT						N/A
425	Uncollectibles, IDC & Other Revenue Adjustments						N/A
430	Revenue Requirements						N/A
435	Access Service Revenues				N/A	N/A	N/A
	RATE BASE						
440	Telephone Plant In Service						
445	Rate Base Adjustments						
450	Depreciation Reserve						
455	Accum. Deferred Income Tax						
460	Average Rate Base						

NOTE : Companies need fill out this chart only for those periods for which they have previously forecast.

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Filing Entity:

TIER 2
ANALYSIS OF ACCESS ELEMENT COST DATA

	FORECAST PERIOD 7/91 THRU 6/92 (NOTE 1)	COMMON LINE	TRAFFIC SENSITIVE		OTHER INTERSTATE	TOTAL INTERSTATE	TOTAL COMPANY (SUB TO SEP)
			SWITCHED	SPECIAL			
		(A)	(B)	(C)	(D)	(E)	(F)
	REVENUE REQUIREMENT						
500	Depreciation/Amortization						
505	Expens Less Depr & Amort						
510	Taxes Less FIT						N/A
515	Return						N/A
520	FIT						N/A
525	Uncollectibles, IDC & Other Revenue Adjustments						N/A
530	Revenue Requirements						N/A
535	Access Service Revenues						N/A
	RATE BASE						
540	Telephone Plant In Service						
545	Rate Base Adjustments						
550	Depreciation Reserve						
555	Accum. Deferred Income Tax						
560	Average Rate Base						
	HISTORICAL PERIOD 1/91 THRU 12/91 (NOTE 2)						
	REVENUE REQUIREMENT						
600	Depreciation/Amortization						
605	Expens Less Depr & Amort						
610	Taxes Less FIT						N/A
615	Return						N/A
620	FIT						N/A
625	Uncollectibles, IDC & Other Revenue Adjustments						N/A
630	Revenue Requirements						N/A
635	Access Service Revenues				N/A	N/A	N/A
	RATE BASE						
640	Telephone Plant In Service						
645	Rate Base Adjustments						
650	Depreciation Reserve						
655	Accum. Deferred Income Tax						
660	Average Rate Base						

NOTE : Companies need fill out this chart only for those periods for which they have previously forecast.

NOTE 1: From 1992 TRP T2COS-2 (page 2 of 4).
NOTE 2: Actual operating statistics.

FILING ENTITY:

T2DMD-1
PAGE 1 OF 3

TIER 2 ACCESS DEMAND
COMMON LINE

	HISTORIC PERIOD	PREMIUM CCL MOU			NON-PREMIUM CCL MOU		
		ORIG	TERM	TOTAL	ORIG	TERM	TOTAL
		(A)	(B)	(C)=A+B	(D)	(E)	(F)=D+E
100	1Q90						
110	2Q90						
120	3Q90						
130	4Q90						
140	1Q91						
150	2Q91						
160	3Q91						
170	4Q91						
180	1Q92						
190	2Q92						
200	3Q92						
210	4Q92						
220	PYCOS PERIOD (1/92 THRU 12/92)						
230	PROSPECTIVE PERIOD (7/93 THRU 6/94)						

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FILING ENTITY:

TIER 2 ACCESS DEMAND
COMMON LINE

	HISTORIC PERIOD	TOTAL CCL MOU ORIG. (G)=A+D	TOTAL CCL MOU TERM. (H)=B+E	TOTAL CCL MOU TOTAL (I)=C+F	TOTAL CHARGEABLE CCL MOU ORIG. (J)=A+(D*.45)	TOTAL CHARGEABLE CCL MOU TERM. (K)=B+(E*.45)
100	1Q90					
110	2Q90					
120	3Q90					
130	4Q90					
140	1Q91					
150	2Q91					
160	3Q91					
170	4Q91					
180	1Q92					
190	2Q92					
200	3Q92					
210	4Q92					
220	PYCOS PERIOD (1/92 THRU 12/92)					
230	PROSPECTIVE PERIOD (7/93 THRU 6/94)					

FILING ENTITY:

T2DMD-1
PAGE 3 OF 3

TIER 2 ACCESS DEMAND
TRAFFIC SENSITIVE

	HISTORIC PERIOD	PREMIUM LS2 (A)	PREMIUM LS1 (B)	NON-PREMIUM (C)	TOTAL (D)=A+B+C	TOTAL CHARGEABLE (E)=A+B+(C*.45)
300	1Q90					
310	2Q90					
320	3Q90					
330	4Q90					
340	1Q91					
350	2Q91					
360	3Q91					
370	4Q91					
380	1Q92					
390	2Q92					
400	3Q92					
410	4Q92					
420	PYCOS PERIOD (1/92 THRU 12/92)					
430	PROSPECTIVE PERIOD (7/93 THRU 6/94)					

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FILING ENTITY:

TIER 2 SPECIAL ACCESS DEMAND COMPARISON

	HISTORICAL 1/92 thru 12/92			PROSPECTIVE 7/93 thru 6/94		
	CHANNEL TERMINATION	CIRCUITS	INTEROFFICE MILES	CHANNEL TERMINATION	CIRCUITS	INTEROFFICE MILES
	(A)	(B)	(C)	(D)	(E)	(F)
100 Metallic						
110 Telegraph						
120 Voice Grade (excl. MATS)						
130 MATS						
140 Audio Program (Full Time)						
150 High Capacity						

FILING ENTITY:

T2DMD-3
PAGE 1 OF 1

TIER 2 COMMON LINE DEMAND AND REVENUE

	HISTORICAL 1/92 thru 12/92		PROSPECTIVE 7/93 thru 6/94	
	REVENUE	MOU OR LINES	REVENUE	MOU OR LINES
	(A)	(B)	(C)	(D)
100 Total End User Charges	_____	N/A	_____	N/A
110 Residance	_____	_____	_____	_____
120 Single Line Business	_____	_____	_____	_____
130 Multi Line Business	_____	_____	_____	_____
140 Special Access Surcharges	_____	_____	_____	_____
150 Carrier Common Line (1)	_____	_____	_____	_____
160 Total Common Line Revenues	_____	N/A	_____	N/A

NOTE : This chart is not applicable for companies that participate in the NECA Common Line pools.

NOTE 1: Line 150 columns A and B should be populated with data reflecting January, 1993 view.

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FILING ENTITY:

MINUTES OF USE DEMAND COMPARISON

		COMMON LINE MOU (A)	TRAFFIC SENSITIVE MOU (B)
100	Prospective 7/93 thru 6/94		
110	PYCOS Period 1/92 thru 12/92 (1)		
120	Prospective 7/92 thru 6/93 (2)		
130	Historical 1/92 thru 12/92 (1)		
140	Prospective 7/91 thru 6/92 (2)		
150	Historical 1/91 thru 12/91 (1)		
160	Prospective 7/90 thru 6/91 (2)		
170	Historical 1/90 thru 12/90 (1)		

NOTES: (1) Actual operating statistics
(2) From 1992 TRP T2DMD-4

NOTE : Companies filing their initial filing are not required to complete this form. Companies participating in the NECA carrier common line pool should populate column A with zero (0).

FILING ENTITY:

T2RTE-1
PAGE 1 OF 1

TIER 2 SWITCHED AND SPECIAL ACCESS RATE ANALYSIS

		7/1/92 RATE	CURRENTLY EFFECTIVE RATE	PROPOSED 7/1/93 RATE	PROPOSED TO 7/1/92 % CHANGE	PROPOSED TO CURRENT % CHANGE
		(A)	(B) NOTE 1	(C)	D=((C-A)/A)*100	E=((C-B)/B)*100
	A. SWITCHED ACCESS RATES					
100	Premium CCL Terminating Rate, Cents Per Minute					
110	Non-Premium Terminating CCL Rate, Cents Per Minute					
120	Premium Switching Rate, Cents Per Minute					
130	Non-Premium Switching Rate, Cents Per Minute					
140	Premium Local Transport Rate, Cents Per Minute (Avg Mileage)					
150	Non-Premium Local Transport Rate, Cents Per Minute (Avg Mileage)					
160	Equal Access per _____					
170	Non-Recurring Charge per _____					
	B. END USER CHARGES					
180	Multiline Business					
190	Residence and Single-Line Bus.					
	C. SPECIAL ACCESS RATES					
200	2-Wire Voice Grade, $ Per Circuit (Avg Mileage)					
210	4-Wire Voice Grade, $ Per Circuit (Avg Mileage)					

NOTE : NECA carrier common line companies are not required to complete lines 100 and 110.
NOTE : NECA and user companies are not required to complete lines 180 and 190.

NOTE 1: If current rates in column C differ from column B, exchange carriers should indicate in a footnote the effective date of the column C rate.

FILING ENTITY:

T2RTE-2
PAGE 1 OF 1

TIER 2 ANNUALIZED ACCESS PRICEOUT COMPARISONS

		REVENUE AT 7/1/92 RATE (A)	REVENUE AT CURRENTLY EFFECTIVE RATE (B)	CHANGE (C)=B-A	REVENUE AT PROPOSED 7/1/93 RATE (D)	CHANGE (E)=D-B
100	Multi Line Business					
110	Residence and Single Line Business					
120	Carrier Common Line					
130	Special Access					
140	Local Switching					
150	Equal Access					
160	Information					
170	Local Transport					

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NOTE 1: NECA Carrier Common Line companies are not required to complete line 120.
NOTE 2: NECA End User companies are not required to complete lines 100 and 110.
NOTE 3: HISTORICAL, 1/92 - 12/92, demand quantities should be uniformly applied to different rate schedules to obtain priceouts.
NOTE 4: All non-recurring charges should be included.

FILING ENTITY:

COSAS FOR WHICH RATES ARE AVERAGED

	COSAS (NOTE)	MULTI LINE BUSINESS (A)	RESIDENCE & SINGLE LINE BUS (B)	CARRIER COMMON LINE (C)
100				
110				
120				
130				
140				
150				
160				
170				
180				
190				
200				
210				
220				
230				

NOTE : Companies should list in the appropriate column all COSAs for which rates are averaged or pooled.

FILING ENTITY:

COSAS FOR WHICH RATES ARE AVERAGED

COSAS (NOTE)	SWITCHING (D)	LOCAL TRANSPORT (E)	INFORMATION (F)	EQUAL ACCESS (G)	SPECIAL ACCESS (H)
100					
110					
120					
130					
140					
150					
160					
170					
180					
190					
200					
210					
220					
230					

NOTE : Companies should list in the appropriate column all COSAs for which rates are averaged or pooled.

FILING ENTITY:

T2ERN-1
PAGE 1 OF 1

TIER 2 ANNUALIZED RATE OF RETURN COMPARISON

		1989/90 FCC MONITORG PERIOD (A)	PRELIMINARY 1991/92 FCC MONITORG PERIOD (B) NOTE 1	PROSPECTIVE 7/93 - 6/94 (C)
100	Total Interstate Access			
110	Carrier Common Line			
120	Special Access			
130	Local Switching			
140	Information			
150	Local Transport			
160	Total TS - Switched			

NOTE 1: While calendar year 1991 is now final, as of the date of this filing, 1992 can only be an ESTIMATE (subject to true-up in September, 1993). This preliminary look at the 91/92 monitoring period Rate of Return should match your first quarter's 492-A reporting, due March 31, 1993.

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FILING ENTITY:

T2REV-1
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ANNUALIZED TEST PERIOD 7/93 TO 6/94 ACCESS REVENUE REQUIREMENTS
DEMAND AND RATE RECONCILIATION - SWITCHED ACCESS

		RATES			RATE MAKING DEMAND			ANTICIPATED REVENUE	REVENUE REQUIREMENTS
		MIN/MSG	MIN MILE	LINE OR TRK	MIN/MSG	MIN MILE	LINE OR TRK		
		(A)	(B)	(C)	(D)	(E)	(F)	G=(A*D)+(B*E)+(C*F)	(H)
	COMMON LINE								
100	MULTI LINE BUSINESS EUCL	N/A	N/A		N/A	N/A			N/A
110	SINGLE LINE BUSINESS EUCL	N/A	N/A		N/A	N/A			N/A
120	RESIDENCE EUCL	N/A	N/A		N/A	N/A			N/A
130	SPECIAL ACCESS SURCHARGE	N/A	N/A		N/A	N/A			N/A
140	TERMINATING CCL PREMIUM		N/A	N/A		N/A	N/A		N/A
150	TERMINATING CCL NONPREM		N/A	N/A		N/A	N/A		N/A
160	ORIGINATING CCL PREMIUM		N/A	N/A		N/A	N/A		N/A
170	ORIGINATING CCL NONPREM		N/A	N/A		N/A	N/A		N/A
180	COMMON LINE - TOTAL	N/A	N/A	N/A	N/A	N/A	N/A		
	INFORMATION								
190	DIRECTORY ASSISTANCE		N/A	N/A		N/A	N/A		N/A
200	WHITE PAGE SURCHARGE		N/A	N/A		N/A			N/A
210	OTHER INFORMATION	N/A	N/A	N/A	N/A	N/A	N/A		
220	INFORMATION - TOTAL	N/A	N/A	N/A	N/A	N/A	N/A		
	LOCAL SWITCHING								
230	PREMIUM LS2		N/A	N/A		N/A	N/A		N/A
240	PREMIUM LS1		N/A	N/A		N/A	N/A		N/A
250	NON-PREMIUM		N/A	N/A		N/A	N/A		N/A
260	EQUAL ACCESS	N/A	N/A		N/A	N/A			N/A
270	SWITCHING - TOTAL	N/A	N/A	N/A	N/A	N/A	N/A		
	LOCAL TRANSPORT								
280	PREMIUM TERMINATION		N/A	N/A		N/A	N/A		N/A
290	NONPREM TERMINATION		N/A	N/A		N/A	N/A		N/A
300	PREMIUM FACILITY	N/A		N/A	N/A				N/A
310	NONPREM FACILITY	N/A		N/A	N/A				N/A
320	TRANS INSTALL PER TRUNK	N/A	N/A		N/A	N/A			N/A
330	OTHER TRANSPORT	N/A	N/A	N/A	N/A	N/A	N/A		
340	LOCAL TRANS - TOTAL	N/A	N/A	N/A	N/A	N/A	N/A		

NOTE : Carrier and End User Common Line data is required from only those companies that file their own rates.

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FILING ENTITY:

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ANNUALIZED TEST PERIOD 7/93 THRU 6/94 ACCESS REVENUE REQUIREMENTS
DEMAND AND RATE RECONCILIATION - SPECIAL ACCESS

		RATES			RATE MAKING DEMAND			ANTICIPATED REVENUE
		TERMS	CIRCUITS	MILES	TERMS	CIRCUITS	MILES	
		(A)	(B)	(C)	(D)	(E)	(F)	G=(A*D)+(B*E)+(C*F)
	VOICE GRADE							
350	2-WIRE CHANNEL TERM	N/A		N/A	N/A		N/A	
360	4-WIRE CHANNEL TERM	N/A		N/A	N/A		N/A	
370	CHANNEL MILEAGE TERM		N/A	N/A		N/A	N/A	
380	CHANNEL MILEAGE FACILITY	N/A	N/A		N/A	N/A		
390	NON-RECURRING (NOTE 1)	N/A		N/A	N/A		N/A	
	HIGH CAPACITY							
400	HI-CAP CHANNEL TERM	N/A		N/A	N/A		N/A	
410	CHANNEL MILEAGE TERM		N/A	N/A		N/A	N/A	
420	CHANNEL MILEAGE FACILITY	N/A	N/A		N/A	N/A		
430	NON-RECURRING (NOTE 1)	N/A		N/A	N/A		N/A	
440	SPECIAL ACCESS TOTAL	N/A	N/A	N/A	N/A	N/A	N/A	

NOTE 1: A "composite" Special NRC must be used if the installation rates vary among the services.

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TIER 2 TEST PERIOD REVENUES

		TOTAL NETWORK ACCESS (A)=B+C+D	RECURRING w/o ICB (B)	NON-RECURRING w/o ICB (C)	ICB (D)
100	Carrier Common Line				
110	Special Access				
120	Local Switching				
130	Equal Access				
140	Information				
150	Local Transport				
160	Total TS - Switched				

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